

Vol. V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1925

No. 240

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

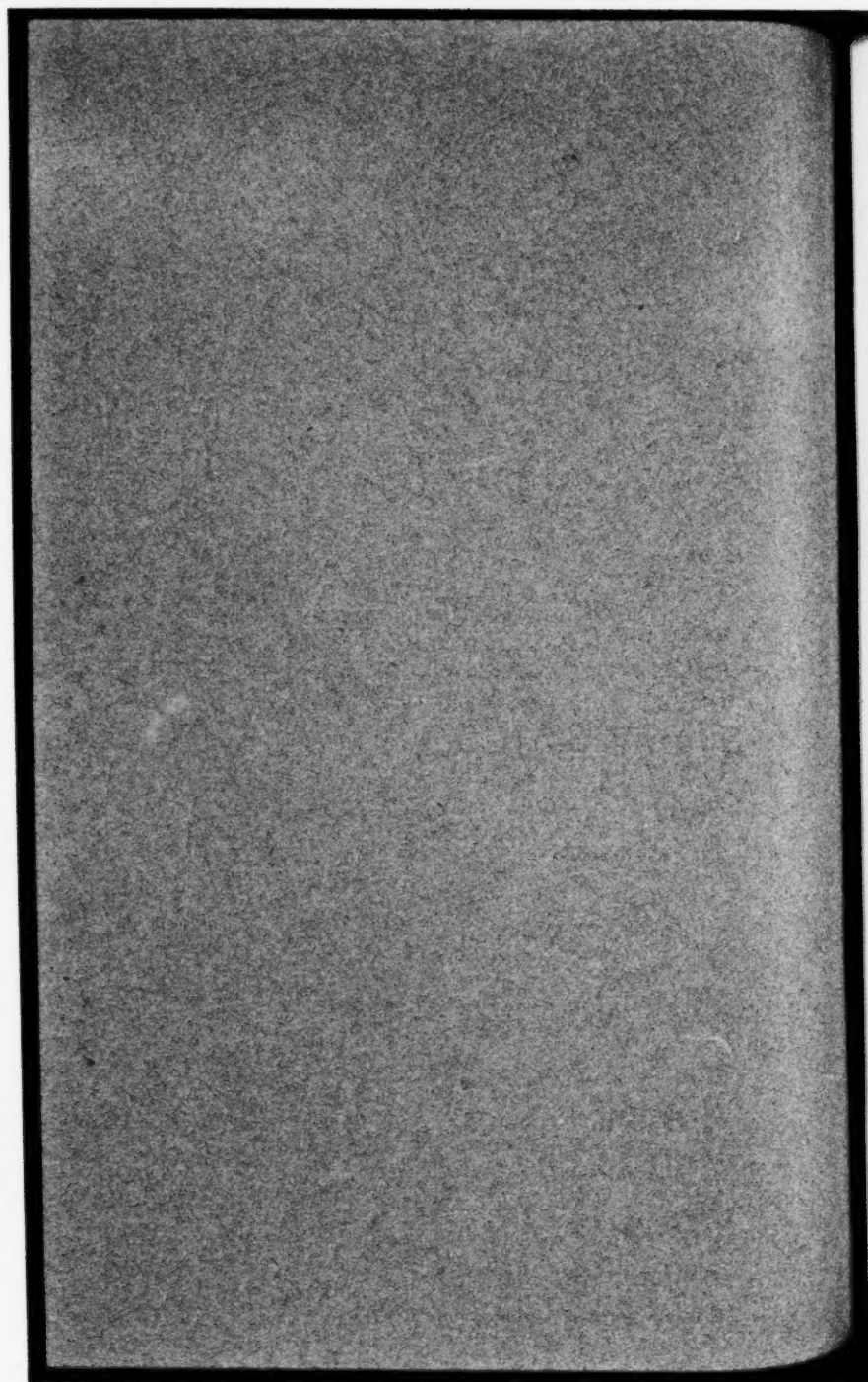
P. LOBILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1925

CERTIORARI GRANTED JANUARY 11, 1926

(31,557)



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United States District Court

DISTRICT OF NEW JERSEY.

BEECH-NUT PACKING COMPANY,

Plaintiff,

VS.

P. LORILLARD COMPANY,

Defendant.

In Equity.

No. 3056.

10

Appearances:

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CHARLES C. BULKLEY, Esq.

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MESSRS. PITNEY, HARDIN & SKINNER, by

E. O. STANLEY, Esq.

For the plaintiff.

20

MESSRS. TREACY & MILTON, by

JOHN MILTON, Esq.

MESSRS. GIFFORD & BULL, by

LIVINGSTON GIFFORD, Esq.

T. GRANVILLE MEYERS, Esq., and

RICHARD B. CAVANAGH, Esq.

For the defendant.

30

Tried before Hon. Charles F. Lynch, Judge, at the Chamber of Commerce Building in Newark, N. J., on Tuesday, October 30, 1923, at ten-thirty A. M.

Mr. Stanley: May it please the Court, counsel in this case are members of the Chicago Bar, and I should like to present Mr. Charles C. Bulkley, Mr. Walter A. Scott

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and Mr. H. McClure Johnson, all of the Chicago Bar, who will actively participate in the trial.

Mr. Scott opens for the plaintiff as follows:

10 This case, your Honor, is a trademark suit and unfair competition case. I think the easiest entrance into the situation is to briefly glance at the bill of complaint which appears at the opening of plaintiff's record. As recited in the first paragraph—(interrupted).

The Court: What page?

20 Mr. Scott: The first page. Plaintiff is a corporation of New York, the Beech-Nut Packing Company. Defendant is a corporation of New Jersey. The second paragraph of the bill recites the first adoption of the trademark by plaintiff's predecessor in title, the Imperial Packing Company, which adopted this mark as stated about 1892. The paragraph goes on to describe the mark as consisting of the familiar oval border with the word, "Beech-Nut" and the sprig of Beechnuts within. I think we need not dwell upon that paragraph.

30 The third paragraph and the fourth paragraph together recite the change of the name of the business from Imperial Packing Company to Beech-Nut Packing Company, and the fourth paragraph recites the incorporation of the business in 1899 as the Beech-Nut Packing Company, with the assignment of the assets of the first company to the new company.

40 The fifth paragraph contains matter that will be interesting to read in a little more detail. The proofs are directed to much that is therein recited. I will read this paragraph:

"Plaintiff's predecessor, Imperial Packing Company, then dealing in certain meat products, shortly after 1891 began a rapid extension of the items of its manufacture; and plaintiff from the time of its acquisition of the business has persistently and rapidly continued that extension. The business of plaintiff by reason of the expendi-

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tures, care, skill and industry of plaintiff increased with great rapidity, so that prior to the acts herein complained of, plaintiff's trademark, trade name and distinctive badge and autograph were familiar to and highly regarded by the public, and on sale largely in stores dealing in package consumable products, such as general stores, grocery stores, drug stores, tobacco stores, news stands and the like; its business aggregated many millions of dollars every year, and comprehended a very large number of packaged products of widely varying character such as chewing gum, ham, peanut butter, jellies, and scores of others. Plaintiff has since added many new products to its line, as, for instance, ginger ale and tinfoil, and has always expected and now expects and intends in the rapid expansion of its business to continue so to do, all without reference to specific similarities or differences between the various items included in plaintiff's line. Plaintiff's goods and those of its predecessor have always been identifiable by the trademark, trade name, distinctive badge and autograph (Exhibit A, *supra*)"—which is simply one of the labels attached to the bill and similar to these on this large exhibit board.

The sixth paragraph I think we may read: "Plaintiff's business has for many years prior to the acts herein complained of been in large measure dependent upon the standing in the mind of the public of its trademark 'Beech-Nut' and that of its trade name, badge and autograph (Exhibit A). The aforesaid trade name, badge and autograph, Exhibit A, except for variations in size, name of particular product and other immaterial variations, has been displayed conspicuously by plaintiff upon widely varying kinds of packaged consumable goods, which plaintiff has from time to time put upon the market."

There was an amendment just made in that paragraph so that my wording may be slightly different from what

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appears in your Honor's copy. The words "without exception" and "all of the" were taken out, because it appears that some imported articles had been sold, not as the Beech-Nut products, but just as a part of their general activity. That simply was to make the paragraph literally accurate. It has no bearing on the case.

- 10 "Plaintiff, in the expansion of its business, has expended more than two millions of dollars in advertising, including substantially every known kind of advertising." The advertising is recited there. Possibly it is not necessary to dwell in detail upon the precise character—billboards and other advertising, and all of the usual means of publicity.

- 20 The seventh paragraph recites matters to which the proofs will be largely directed. "By reason of the foregoing, of the care, skill and industry and expenditures of plaintiff; and by reason of the high regard enjoyed by plaintiff's trademark and trade name 'Beech-Nut,' distinctive badge and autograph (Exhibit A) it came about (long prior to the beginning of the acts herein complained of) that the trade and public of the United States recognized the label Exhibit A as plaintiff's distinctive badge and as plaintiff's personal autograph; and as indicating that any consumable packaged product bearing aforesaid badge, trademark and trade name and appearing upon
- 30 the shelves of a retailer alongside other products bearing the same badge, was of the same origin as those other products and of the same high standard of excellence."

- 40 The proofs will be very largely to that point. "Each new product so marked was long prior to 1915, and thereafter, and is now, received with immediate and marked favor by the public, * * *." The significance in there is the word "new." Each *new* product is so received immediately "* * *" by reason of the public's gratification and satisfaction with the previous products, simi-

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larly identified, by reason of the high regard the public had for plaintiff, and without such sales resistance as meets the ordinary merchandizing of a new product."

There is another significant expression "without such sales resistance as meets the ordinary merchandizing of a new product."

The proofs will be directed toward the proposition, which is amply established, that these new products went into vogue, into use, upon the reputation of their predecessors, notwithstanding that that particular article had not previously been put out by the Beech-Nut Packing Company. "By maintaining its standards of quality, at the cost of the most indefatigable and zealous effort, plaintiff has been and is enabled to maintain a large and growing demand for the goods of its manufacture, identified as of its manufacture by the trademark, badge and autograph, Exhibit A."

This next paragraph recites an application for registration of this trademark upon sixty-seven products, which was granted by the Patent Office in 1912. Of course, the rights of the company exist quite independently of any registration, but as a matter of fact they did register the mark for sixty-seven products in 1912.

I think the reading of that paragraph is unnecessary. What I have stated is the substance of it.

The ninth paragraph recites the charge:

"Defendant, well knowing the premises, and contriving to injure plaintiff, to cramp the legitimate expansion of its business, and divert from its profits, gains"—(it should be "from *it* profits, gains") "• • • and advantages which otherwise would accrue to plaintiff, to the irreparable and vast damage of plaintiff has infringed plaintiff's trademark, appropriated plaintiff's trade name and forged plaintiff's autograph; and has been guilty of unfair competition in trade against plaintiff."

And the following sentence recites the threat to continue so to do in the usual formal language.

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We come here in the tenth paragraph to one of the particular charges upon which the proof is based.

10 The Tenth Paragraph: "Thus defendant in the District of New Jersey, and elsewhere throughout the United States, without leave or license from plaintiff and against its protest," and about that protest in 1915 much of the evidence and discussion in this case will hinge "has been and is engaged in the manufacture and sale (in commerce among the several states) of a product known as 'Beech-Nut' scrap tobacco, a cheap tobacco made of 'scrap' for tobacco chewing—" the word "cheap" there will receive some attention in the evidence—"upon which product, as packaged for the consumer and the retailer, is prominently displayed a fraudulent imitation of the distinctive label of plaintiff (Exhibit A); a specimen of said imitative label appears affixed hereto as Exhibit B."

20 I think your Honor will find that pasted in the record following the bill, that Exhibit B. It is not in my book, but I think it is in the book before your Honor. It has the radiating marks around the oval, that is the one (indicating). That is the label which the Lorillard people put on scrap tobacco in 1915, and which gave rise to the conditions that are mentioned at this point.

30 "—a specimen of said imitative label appears affixed hereto as Exhibit B; to the confusion of the trade and the public, who are likely to, and in fact have generally believed that the so-called 'Beech-Nut' Scrap Tobacco is another extension of plaintiff's line—" At this point I might, by way of anticipation, ask your Honor's attention to that expression, "is another extension of plaintiff's line," the exact words are used by witnesses, as we shall prove, that when they saw the new products come out, having seen a great many of the preceding Beech-Nut products, they thought them another extension of the line—"and a product made by plaintiff. Defendant in so doing, and in its sales effort with respect to the so-called 'Beech-Nut' Scrap Tobacco has been guilty of

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trademark infringement and of unfair competition in trade and has promoted and caused confusion in the trade to its own illegitimate profit and to the vast and irreparable loss, damage and injury of plaintiff."

This eleventh paragraph recites the high reputation of plaintiff, and the evidence will show that the facts set forth in this paragraph are the result of the studied policy of the company.

"Plaintiff (and its predecessor) by thirty years of cumulative, persistent, indefatigable effort of an organization now numbering many hundreds of individuals, and by the expenditure of more than two millions of dollars in advertising, has established its label, Exhibit A, as indicating plaintiff's manufacture wherever it appears, thereby denoting the highest quality that can be obtained"—on that word "quality" we will prove the attitude and impression of the public and their expectation when they buy an article with the Beech-Nut label upon it—"highest quality that can be obtained, with respect to cleanliness and general supreme desirability of any consumable product bearing that label. This reputation of plaintiff, associated with the aforesaid label, is nowhere better established than among the most refined and prosperous of the female members of the public." That sentence will have some bearing on the evidence which will be put before the Court, "the female members of the public," and their attitude toward the production of chewing tobacco and cigarettes and the consideration that was given to them by the Beech-Nut Company, and why it refrained from dealing in tobacco products.

"Among these persons, as well as to a substantial extent among the public in general, chewing tobacco is regarded with disfavor. Recognition as a manufacturer of chewing tobacco (particularly a cheap scrap tobacco) is not compatible with the standing plaintiff has achieved, either in the minds of its female customers or in the minds of the public."

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While possibly none of us in this room is burdened with that prejudice regarding tobacco, it will be quite surprising when we come to the evidence in this case to find what a very considerable number of people were led to criticize and to think less of the Beech-Nut Company when they saw these products.

10 "Yet such recognition of plaintiff as a manufacturer of 'cheap' chewing tobacco has been and will be the inevitable result of defendant's imitation of plaintiff's label, Exhibit A. Furthermore, such recognition has and will jeopardize plaintiff's standing with a considerable body of plaintiff's trade," something that the evidence abundantly proves (*i. e.*, retailers and jobbers), both through prejudice, among members of that trade, against chewing tobacco, and also through a lowered respect for plaintiff's intelligence, which has been and will be the result of
20 plaintiff's being believed in its trade to have embarked on the manufacture of cheap chewing tobacco * * *."

In the twelfth paragraph there is recited the injury which has come about by the poster and billboard advertising which the Lorillard Company has done. There are one or two witnesses in particular whose testimony will be placed before the Court, one instance showing the case of a man riding in his automobile, who saw this sign and went home and told his wife not to buy any more Beech-Nut products, and who went around and told all his friends
30 not to, as we shall prove. The existence of those people, regardless of our sympathy or non-sympathy, must be taken into account by the business man, a man conducting a great business enterprise.

The thirteenth paragraph recites: "Defendant further aggravating its injury hereinabove complained of and desiring still further wrongfully to exploit the good-will of the purchasing public toward any packaged consumable product bearing plaintiff's trademark, trade name and autograph, without leave or license from plaintiff, but
40 over its protest and against its will intends, is prepared,

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and threatens to flood the market (and engage in commerce among the several states) with a so-called 'Beech-Nut' cigarette."

This bill was filed just when the putting out of that cigarette was under preparation.

The fourteenth paragraph recites the widespread recognition of "Beech-Nut Quality" which has been built up by the advertising and general publicity efforts of the Beech-Nut Packing Company.

The fifteenth paragraph recites a detail seeming to show not only the effort to appropriate the trade name in its essence, but to appropriate the little accompanying incidents, so that there might be no mistake in the public mind.

"Defendant," in paragraph fifteen, "desirous still further of promoting confusion in the trade and of illegitimately converting to its own uses the good-will and reputation of plaintiff, has caused to be printed upon its imitative cigarette wrapper, approximately a million of which defendant has had printed and is ready to launch on to the market (Exhibit C), a panel containing the inscription: 'Cigarettes of Beech-Nut Quality have never before been offered to the Public.' * * *"

That particular label was changed before the cigarettes were put out, as the evidence will show, and the reasons for the change will be made clear by the evidence.

The remaining paragraphs are devoted to the conversion of the profits, the prayer for relief—I think we have pretty well covered the substance of the bill of complaint, and now I shall, if I may, outline briefly the facts which will be shown by the evidence. A good deal of this evidence has been taken by depositions. There will be some witnesses on both sides, and without a pretty full opening statement on each side, the order of development will be so interfered with that the Court possibly would not get the force of the testimony as readily as with opening statements, and I believe it has been agreed

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by both sides that we shall present our case to the Court in that way before we put on our witnesses, and if the Court approves we will go ahead in that way.

10 This business of the Beech-Nut Packing Company was established by individuals along about the year 1890. At first, as one of the witnesses says, the hams were cured in a cellar and smoked in a barrel behind the barn, and along about 1892 they incorporated as the Imperial Packing Company.

20 During the years following 1890 or 1889, I don't know that the date is precisely fixed, when the first hams and bacon were put out, the business was confined, I think, to those products. As the years went by various conserves were added to the products, and the business gradually increased along through the 90's, but as to the precise figures and volume of its business, we can't produce any figures on account of the fact that no records are extant prior to 1903, when there was a fire; but the business grew, according to the testimony of the witnesses, during those years, and in 1899 the management of the company, finding that its greatest asset in a business way was the word "Beech-Nut" itself, and the recognition by the public of that mark, decided to reincorporate under a new name, so they incorporated as the Beech-Nut Packing Company. The word "Beech-Nut" thus becoming
30 both the corporate name and the trademark of the company, the business went on.

In the year 1903 we shall show that the business of the company had increased as to variety of articles, so that it included ham and bacon in bulk, and sliced bacon, sliced beef, and chopped beef, and three kinds of jam. There were eight products they were making in 1903. The business increased year by year after 1903, with some additions each year, until we come down to the year 1915. In 1909 there were fifty-three products put out under this label, including the conserves, the candies, the meats and
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the various products. In 1911 chewing gum was added, and so by 1915 there were fifty or sixty products, and this trademark had received wide recognition, as the evidence will show.

The label board—as I understand it, this label board has been stipulated in as correctly showing our labels year by year with the dates above them.

Mr Cavanagh: Yes.

Mr. Scott: And that board outlines what will be, what is, shown in the case.

Going back to the years 1900 to 1905, your Honor will observe a comparatively small number of products, the increase from 1905 to 1910, and so on in these various columns. It gives a graphic illustration of the growth of the business and the increase in the number of products. The increase in the number of products is something that we wish to emphasize independently of the volume of the business. That has a bearing independently of the volume of the business as a whole, the variety of products. The volume of the business as a whole is shown in a tabulated statement in the farthestmost part of the record, upon page 868, about three or four pages from the last page in the book. We have a statement of the volume of the business, which begins in 1903, on account of there being no records before that; and, as your Honor will see, in 1903 the comparatively small number of products then made, as shown in that column, 1900 to 1905, had a sale of over half a million dollars, and by running down this column we find a gradual and steady increase to 1921, when the sales amounted to twelve million dollars.

Now, that briefly outlines what we shall prove in regard to the founding and the growth of this business.

I will next state to the Court what we shall prove with regard to the policy of this company, and I shall then state what we shall prove in regard to the success of that policy and its effect upon this suit.

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Mr. Francis E Barbour is the Vice-President of this company and has been since the year 1910. His testimony will be to the effect that it is the studied and designed policy of the company to increase its business by increasing the number of products put out as distinguished from the policy of concentrating upon a single thing. Of course, the two avenues of progress are open to any business enterprise, concentration upon one thing or increase in the variety of products.

The policy of the Beech-Nut Packing Company was the increased variety of articles. Now, as will be shown from Mr. Barbour's testimony, such a policy involved this inherent difficulty, that every one of these new products that are put upon the market appears in competition with a vast number of other makes of a similar product, and unless there is some force behind it, each new product must await a long period of publicity and advertising before it acquires that recognition by the public necessary to make it profitable.

As Mr. Barbour will explain, they wanted to adopt a policy which would get around that difficulty, to overcome this resistance to the sale of a new product. These are all staple articles which the Beech-Nut Packing Company sells, articles of which a dozen other brands may be bought, and when they put out a Beech-Nut brand of some article not previously made it was only adding one to a line of a dozen brands on the grocers' shelves. They had to study out some way to individualize that product and take it out of that class which the people consider just another kind of jam, or just another this or that; so, as Mr. Barbour's testimony will show, they adopted the policy of paving the way for each new product by the high quality of all of the products they put out. That sounds very obvious and very simple, but when we consider the vast number of products put out by this company and the pains to which this company went to em-

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phasize the mere attribute of quality to such an extent that it would individualize this company, we see that that was really a very important and difficult thing to bring about. And they went to this extreme, as Mr. Barbour says, they decided that they would not put an article on the market which was not in their opinion better than any article of that kind put out by any other company, and that it must, at least in their opinion, be better or they would not put it out, and they have pursued that policy, and we shall have testimony to their efforts on one of these products, an article seemingly as simple as salted peanuts. Mr. Barbour will show the Court that there are several brands of this article on the market, selling profitably to the makers, but he says there is not one of them they consider good enough to put out under the Beech-Nut label, and that they have spent six or seven years in their laboratories investigating salted peanuts, and they have not found one yet they consider good enough to put out under the Beech-Nut brand. Therefore, when Mr. Barbour speaks of emphasizing this matter of quality it is not a mere idle advertising slogan; it is something that runs to the very heart of this company's policy and governs its activities.

We shall show by a witness the conditions necessary in the Beech-Nut plant to bring about this condition of affairs—the immaculate cleanliness, the sanitation, the invitation that is extended to the public to inspect this plant, the provision of guides to take the people through—I think even the posting of signs on the roads inviting automobilists to visit the plant for that purpose.

Now, I dwell upon the anticipated proof on those points for the purpose of showing the back-ground upon which this competition of which we complain was precipitated. The management of a company of this kind is peculiarly dependent upon the maintenance of this policy when once started, because there are sixty-seven products. The tes-

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timony will show that they are all lumped in the public's mind, that the public have a classification of Beech-Nut products in which they include all these widely varying articles, and if they find one or two of those products bad, the thing carries over to all the rest. Whatever affects the reputation of one of these products, affects the
10 reputation of all. The eggs are all in one basket. If there is one rotten one, they all are thought to be rotten.

Now, in the year 1915, after the establishment of the conditions I have recited, by the painstaking methods I have recited, there appeared upon the market Lorillard Scrap tobacco. The evidence of the deception of the public immediately began to accumulate.

The Court: Had your company handled tobacco prior to that time?

Mr. Scott: It never did, and I will come to the proof
20 upon that point as we go along, and explain to your Honor the ground upon which this suit is based. Your Honor is probably familiar with some of the litigation, some in this Circuit, in the Overland case. Your Honor is probably familiar with that, and with the Aunt Jemima case and others of that kind, in which the Courts deal with that precise point, and in which your Honor's inquiry can be answered in the words of a Court, more forcibly than in mine, and more persuasively. Immediately upon
30 the appearance of this Scrap Tobacco, orders began to come to Canajoharie, where the plant of the Beech-Nut Company is, for this Scrap Tobacco, and the extent of this deception, I think, will surprise your Honor, as it did even counsel themselves who were collecting the evidence, the deception which resulted from putting out this scrap tobacco. The Beech-Nut salesmen and retail dealers were assailed with inquiries as to whether the Beech-Nut Packing Company was putting out Scrap Tobacco, and were going to extend their business into scrap tobacco. The attitude of the public is shown here abundantly by
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testimony introduced by both sides, showing through the testimony of retailers the comments made to them by their own customers, and also by the testimony of the consumers themselves. A surprising fact, which will be shown to your Honor as this testimony develops, is that in the case of many of these witnesses who were deceived as to this scrap tobacco, who thought it was a Beech-Nut product, their deception continued for years, and in some instances it continued until either just before they were examined as witnesses and in some cases it continued until they found out while on the witness stand that the Beech-Nut Company did not make this product. In one instance a witness never has found out, I believe. He was put on the stand without telling him. His state of mind was ascertained, and he was examined, and it was shown that he was under this misapprehension, and upon cross examination counsel for the Lorillard Company asked some questions which seemed to imply that the tobacco was not made by the Beech-Nut Packing Company, and the witness seemed to resent it. He seemed to think counsel was misleading him, and he said, "Put me right, who does make this?" There was a man whose deception continued, and is continuing yet for all I know. But these witnesses go by dozens and scores and hundreds. It isn't a matter of individual instances. There is no possibility of these things having occurred by accident or by careful selection. As your Honor hears the testimony, you will hear not only the testimony of our witnesses who testify to this deception, you will be presented with the testimony of hundreds of witnesses for the other side, a very considerable proportion of whom testify to exactly what I am telling the Court, namely, to this deception, showing the utter impossibility even of counsel interested in finding witnesses who are not deceived—the impossibility of their going out among a hundred million people and finding two or three hundred for witnesses, without drawing a very considerable num-

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ber, probably twenty or thirty, who were deceived. That is the strongest kind of evidence. We show that people are deceived. The evidence for the defense will show that it is impossible to get any considerable number of people collected without including a very large proportion who are laboring under this very deception. It is wide-spread and national.

Now, in the year 1915, your Honor, when that scrap tobacco appeared upon the market, Mr. Barbour, the vice-president of the Beech-Nut Packing Company, wrote a letter, as the evidence will show, directly to the Lorillard Company, complaining of this conduct, protesting against it, and asking that it cease. In reply to that letter Mr. Barbour was informed by letter from the Lorillard Company that the Lorillard Company and its predecessors in title had continuously used this trademark on tobacco since 1898, "as shown by the records of our company." Now, I would ask your Honor to bear that statement in mind. It is going to come up again, and the form of it. It is a representation of fact in terms so distinct and so clear, that the most ingenious imagination cannot conjure up any explanation or any theory that they meant anything other than precisely what they said. "The Lorillard Company and its predecessors in title have used this trademark upon tobacco continuously since 1898, as shown by the records of our company."

They did not even leave a loophole in which to say that they had spoken from memory, and that it was a mistake. They said, "as shown by the records of our company," a representation bearing upon its face every indication of certainty, and of care, and of the intention of the party making the allegation to stand by it, and that it was true. Mr. Barbour received this letter and he wrote back asking them to send him samples of their product showing the manner in which they had been using the word "Beech-Nut" since 1898. The Lorillard Company enclosed him some old price lists, and also sent him the two labels which

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the Court will see in the upper left-hand corner, where your Honor will see two labels bearing the word "Beechnut" and under the word "Beechnut," the picture of a squirrel. That is what they had been using since 1898.

Now, for the purpose of making the force of this representation, which will be proved, clear to the Court, we have put upon that card, under those two "squirrel labels," as I will call them for clearness, we have put the standard Beech-Nut oval label. These are all so much alike that one is representative of all. At the right-hand of that card, your Honor will find the Beech-Nut Scrap Tobacco label, under which the Lorillard Company put out this scrap tobacco in the year 1915. The representation carried with it inevitably and infallibly the thought that the Lorillard Company, having owned this mark since 1898 was continuing the business under that label which your Honor sees at the right. Without anticipating the evidence, I will merely ask your Honor to form his own impression regarding the proposition whether that label at the right of that card evinces an intention to continue the reputation built up by that squirrel label, or an intention to purloin the reputation which had been built up by that oval label. To accentuate that point, I will state to your Honor that in this correspondence which took place between Mr. Barbour in 1915 and the Lorillard Company, Mr. Barbour told the Lorillard Company that that tobacco was sailing under the Beech-Nut colors and was being understood to be a Beech-Nut product. The Lorillard Company wrote back to Mr. Barbour saying to him that that was ridiculous, using that word, and saying "If anybody thought that our scrap tobacco was a product of the Beech-Nut Packing Company it would be a detriment to us."

Now, I ask if any reasonable person can look at that card and think that the corporation that put out that trademark at the right, as your Honor holds it, was trying to avoid the evil which would flow from being iden-

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tified with the oval mark in the lower left-hand corner, trying to avoid that detriment to their reputation and to benefit by the reputation that would come from the squirrel. The proposition is so inherently ridiculous, so inherently unbelievable that evidence is hardly necessary to support further the proposition that there was design
10 and intent in the adoption of that label on the right, to repudiate that squirrel label and to pretend identity with the product appearing under that standard Beech-Nut label. But the evidence will illuminate that point still farther.

There is another point that I might state to your Honor in this connection, but I will defer it until I explain some further proof that we are going to introduce. This representation being made to the Beech-Nut Packing Company, we must pause to consider the bearing of this evidence and other evidence upon the attitude of the Beech-
20 Nut Packing Company at this time. The inquiry which the Court made a few moments ago as to whether the Beech-Nut Packing Company had ever used this mark upon tobacco comes in at this point very pertinently and I deferred a discussion of it until now because at this point it illuminates the discussion a little more clearly. The Beech-Nut Packing Company never used this trademark upon tobacco except later upon ten or twelve dollars' worth that they sold to qualify for a Patent Office registration, which we will talk about later. But as a business
30 proposition, they never sold any tobacco products under this label. They are not asking for any relief in this Court upon any proposition of that kind. The relief which they ask in this Court is based upon the proposition that the significance attached to this trademark by the public as indicating that any commodity bearing that trademark, especially a packaged commodity bearing that trademark, and sold in grocery stores, tobacco stores, drug stores, and so forth, is a product of the Beech-Nut Packing Company. That is the theory upon which this prayer for relief is
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based. I will not, of course, in this opening statement, discuss the law, but briefly we may state that in the Overland case, the sale of a tire was held to infringe the Overland trademark or trade name upon an automobile. No man could buy a tire thinking it was an automobile or vice versa, but the proposition was that here is an invasion of another's reputation. Here the tire man appropriates and profits by the business reputation of the automobile man. Here the tire man saddles upon the automobile man, the responsibility for the quality of the tire and for the fair dealing of the man who sells the tire, and it is wrong that the maker of an automobile should have this responsibility imposed upon him. It is wrong that the reputation which he has built up by advertising and by expensive publicity of all kinds should be diverted from him. There is an infinity of trademarks to select from. Why should this man select Overland for his tires? That is the tenor of these cases upon which we shall rely. We shall show by the evidence that this reputation of this wide-spread extent which would cause people to accept a tobacco product as the product of the Beech-Nut Packing Company, did not exist in 1898. In 1898, we admit that we had no such cause of action. The business of the Beech-Nut Packing Company was a small business then, five or six products, and there was no reason in 1898 why the trademark "Beech-Nut" upon bacon and ham on the one hand, and upon tobacco, on the other hand, should not proceed along perfectly peaceably and innocently by both parties. Neither party's reputation was such at that time that any one would think that the Beechnut tobacco was made by this comparatively small packing house in Canajoharie, New York, it being a comparatively small business at that time. It was not until, by the growth of their business their reputation had so extended as to cause the public to attach this significance to their trademark, that is the significance of believing any product bearing that name was theirs—it was not until their business had grown

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- to that extent that any cause of action could exist. The cause of action here is the existence of that widespread reputation built up by painstaking and expensive efforts and until that reputation existed to that broad extent there was no cause of action. There was no cause of action in 1898, therefore, since which year the Lorillard
- 10 Company represented to the Beech-Nut Packing Company that they had continuously used this trademark upon scrap tobacco. It appeared to the Beech-Nut Packing Company, upon consideration, that they had no cause of action. They did not admit and never will admit that this trademark prestige of theirs does not extend over all of this vast field of goods which are handled in stores of this kind, but it seemed that there was an exception which must be carved out of it, that while they were building up this vast field of trademark publicity and appropriating
- 20 this field in this way, that before they had accomplished that purpose the Lorillard Company, according to their representation had acquired an indefeasible right in this word "Beech-Nut" for that one article, scrap tobacco, and therefore, there was nothing for the Beech-Nut Packing Company to do but abide by the result. This condition seemed to have come about innocently. When the Beech-Nut Packing Company adopted this trademark it adopted it rightfully, and when the assignor of the Lorillard Company in 1898 used this trademark upon scrap tobacco, he
- 30 was doing so innocently. The two businesses were small, and the general theory, the old theory, of the law is perfectly correct—we don't ask for any modification of it—the same trademark may be used upon baby carriages that is used upon lumber without conflict. There are hundreds, thousands, of cases to that effect, and that was the condition which existed in 1898, when the assignor of the Lorillard Company put this trademark upon scrap tobacco, perfectly rightfully, no reason why he shouldn't, knowing it would cause, and could conceivably cause, no confusion.
- 40 At that time, the Beech-Nut Packing Company did not

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even know of the existence of the tobacco. The tobacco was out in Kentucky and doubtless quite likely—the record does not show it, but quite likely the tobacco man did not know anything about the Beech-Nut Packing Company. But even if he did, that does not make any difference—there was no conflict. The situation was perfectly legal.

Now, the Beech-Nut Packing Company, in pursuance of its adopted policy built up its business so that its reputation expanded to such an extent that it overlapped that scrap tobacco. Their design was to build up this reputation unimpaired by anything, to have its reputation for all of this class of goods. But they were so unfortunate as to find that as to an individual product the field had already been appropriated. Therefore, in 1915, as the evidence will show, these letters of protest came to an end. The correspondence extended from June to September, and then the Beech-Nut Packing Company was inactive, took no further steps to stop the Lorillard Company, and there was no reason why they should. Here was this representation as to facts peculiarly within the knowledge of the Lorillard Company facts, inaccessible to the Beech-Nut Packing Company, which upon its face gave the Lorillard Company the indefeasible right to go on with the scrap tobacco. It was an unfortunate situation, it created a conflict, but it seemed to be founded in the strict letter of the law, and the Beech-Nut Packing Company thought itself helpless, and the situation proceeded in that way to the year 1919. The Beech-Nut Packing Company was inactive as to any protest from the years 1915 to 1919. Their inactivity followed, and as we shall see, was the absolute result, the direct result of this representation.

In 1919, the Lorillard Company made plans to put out a Beech-Nut cigarette with which the public is quite familiar at this time. There ensued negotiations between the Beech-Nut Packing Company and the Lorillard Company. The Beech-Nut Packing Company protested. They

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10 had a meeting and the Lorillard Company agreed to make some sort of alterations in its package. The package had originally had on it, "Cigarettes of Beech-Nut quality." I don't think that was ever put on the market, but the wrapper was shown to the Beech-Nut Packing Company. That is an old slogan of the Beech-Nut Pack-
20 ing Company, "Beech-Nut quality," and that was put on the wrapper. They offered to take that off, and I think that has never appeared, and they offered to make a change in the color, the red color, they offered to change to some other color but it does not appear of record what it was. And these negotiations went on through correspondence for some months. They did not arrive at any agreement. The Beech-Nut Packing Company offered to accept any reasonable changes that they would make. Of course, the Beech-Nut Packing Company did not feel
30 in a very strong position. They were there trying to protect their trademark, to get these people to make some change, but they did not have any very heavy club to wield over them. They did not have any club at all, because in their understanding, instilled into their mind by the Lorillard Company, the Lorillard Company had an indefeasible right to use this mark upon tobacco since 1898. And after more or less discussion, the Lorillard Company, as the evidence will show, offered to make a few slight changes in the wrapper before they put the
40 cigarette out, if the Beech-Nut Company would pay them some money, \$10,000, I think, to pay for the original wrappers which they would have to destroy. That seems to have been the last straw, and the negotiations were broken off, and the Lorillard Company put out the Beech-Nut cigarettes.

In the meantime and during or shortly before these negotiations wherein the Beech-Nut Packing Company rather helplessly, and without much hope of success, was trying to induce the Lorillard Company to avoid this precise
50 facsimile, as one might almost say, of their trademark—

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during those negotiations, the Beech-Nut Packing Company filed an application in the Patent Office for registration of its trademark. And they had the American Tobacco Company make them up about twenty-five or fifty dollars' worth of cigarettes with the word "Beech-Nut" printed on the boxes. It is necessary to go through that formality, and they sent some to their lawyer of record, and one or two other people, so that they could make the qualifying affidavit and say they sold some of these cigarettes in interstate commerce. The filing of this application seems to have been based partly upon desperation and partly upon the theory that while the Beech-Nut Packing Company, under the facts as represented by the Lorillard Company, must grant that the Lorillard Company had a perfect right to put out scrap tobacco under the Beech-Nut trademark, the theory appears sound that that right, based upon scrap tobacco from 1898, creating as it did, great confusion in the market and in the mind of the public and imposing a hardship upon the Beech-Nut Packing Company, would afford no warrant for the Lorillard Company to extend that right to cigarettes.

Although we hear much in Patent Office discussions of trademark questions about the use of a trademark upon one article in a class giving right to its extension to other articles in its class, that is simply a matter of interpreting a statute which has no effect beyond the regulation of registration in the Patent Office. Here was a case in which special circumstances existed, and the application was filed for registration of the trademark on cigarettes by the Beech-Nut Packing Company. This application was known to the Lorillard Company, during the negotiations as the evidence will show when it comes before your Honor, and, I think, just before the termination of the negotiations, the publication in the Patent Office Gazette, that this application had been examined

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and was about to be registered appeared. The publication in the Patent Office Gazette is to enable anyone who considers his rights violated to oppose the registration. There is a statutory proceeding called an "Opposition," and the Lorillard Company, seeing the publication of the intention of the Patent Office to register the cigarette trademark for the Beech-Nut Packing Company, filed this notice of opposition.

Now, that leads to a trial in the Patent Office conducted in general the same as litigation is before any tribunal. The Patent Office acts in a rather judicial capacity in those matters. The evidence is taken by deposition, and the cases are argued. Now, this opposition led to the taking of evidence in the Patent Office by both parties, and that record in the Patent Office is incorporated in the record of this case by stipulation, and the testimony presented to the Patent Office is before your Honor by stipulation as if taken in this case. That testimony taken in the Patent Office shows facts which I ask your Honor to compare with the representation made by the Lorillard Company to the Beech-Nut Packing Company in the year 1915. In the Patent Office proceeding, your Honor, an official of the Lorillard Company testified that that old squirrel tobacco, represented by that mark in the upper left-hand corner of that board—that the sale of the goods upon which that trademark appeared decreased year by year until 1910, mind you, your Honor, 1910—it had been decreasing long before 1910—had decreased year by year until in 1910, only 25 pounds were sold, and that in the years 1911, 1912, 1913 and 1914, not an ounce was sold or in existence in the possession of the Lorillard Company, so far as the evidence shows.

The superintendent of the factory of the Lorillard Company, where that squirrel tobacco was made, testified that its manufacture was discontinued not only for those four years from 1911 to 1914, but probably for six years.

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Now, as this evidence comes before the Court, I would ask your Honor to contrast that statement with the representation made to the Beech-Nut Packing Company by the Lorillard Company in the summer of 1915, wherein the Lorillard Company said to the Beech-Nut Packing Company, "We have used this squirrel trademark upon tobacco continuously—we and our predecessors—continuously since the year 1898, as shown by the records of our company." And what did their records show, if they had any? These men remembered and testified, and they were officers and employees of the Lorillard Company, they testified that that mark was absolutely discontinued for four years, both as to manufacture and sale, and the superintendent of their factory said that the manufacture of those goods was discontinued for probably six years 10

Now, all of this, as the case progresses, will be directed toward our proposition that that mark was abandoned; it was so held by the Patent Office, that it was abandoned in 1915. There was no continuity. Every act showed an intention to abandon. The intention to abandon can be read from that placard which is before the Court; looking at this label at the right, no one can conceive that it was not the intention to abandon whatever prestige attached after these years of disuse to that squirrel label, and to substitute for it the prestige of the similar Beech-Nut label. It isn't consonant with any intention or desire to continue with that old squirrel brand, to produce that oval trademark, so similar to the Beech-Nut trademark. A further point bearing upon abandonment is this: Your Honor, if a smoker, and if not, as a matter of general knowledge, will know that most of us are quite particular about the flavor of our tobacco. We like a certain cigarette or cigar and will walk two or three extra blocks to get it. And when we are accustomed to buy a brand and the flavor changes, we quite resent it. We don't consider it as the same goods any more. We 30 40

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look around for a different one and start over, buying something else we like. Now, in the case of this tobacco which had been manufactured under that squirrel mark, and of which the Lorillard Company claims their present goods are a continuation, that scrap tobacco that was made and put on the market under that squirrel label has never been made by the Lorillard Company since the year 1910 to this day. They have put out a different product under that label at the right hand of the card before your Honor, they put out a different mixture, as stated by their own superintendent of the factory where they made it. There was no continuity as to the product. They changed the flavor of the product, as will be brought to your Honor's attention. Several witnesses testified, the testimony is hardly necessary, to the fact that the preservation of the blend and the flavor—they testified rather indirectly—they say that everyone is particular. One man likes one flavor and another man another—that's the way they testified, which is, in effect, the same proposition that I advance, that it is important to preserve the continuity of the compound of tobacco. Otherwise, if you change it, one man being particular in liking this, and another liking that, their trade is lost. That is another matter to which we will call your Honor's attention as the case progresses upon this question of abandonment. The evidence which we shall produce will be directed to showing your Honor that that statement made by the Lorillard Company to the Beech-Nut Company in 1915 was an absolutely flat, intentional and fraudulent misrepresentation, wherein they stated to the Beech-Nut Packing Company, "We and our predecessors have used this mark continuously upon tobacco since the year 1898, as shown by our records."

Now, it is proved, beyond the possibility of dispute, that if they had looked at their records, and told us honestly what the records showed, they would have

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found and told us that it had been discontinued for four years. They would have found that the tobacco itself which had previously been made under that squirrel label had never again been made and is not being made today.

Therefore, the case takes on quite a different aspect from that which it seemed to have to the officials of the Beech-Nut Packing Company in 1915. These later developments have shown that the Lorillard Company had no rights, dating from 1898. Therefore, immediately after these facts developed in the Patent Office, this plaintiff came promptly before this Court and filed its bill, for the first time knowing that it had a right of action against the Lorillard Company upon this Beech-Nut Scrap Tobacco. 10

Previous to the time of these proceedings in the Patent Office, plaintiff had been deliberately misled, led to believe that the Lorillard Company had an indefeasible right to this trademark on scrap tobacco since 1898. In the Patent Office they found that the Lorillard Company had abandoned the mark and that the Patent Office had so held. The Patent Office and the inquiry will come into your Honor's mind as to what they did then with that application—the Patent Office in matters of trademark registration acts under a very narrow and restrictive statute. Your Honor, undoubtedly, understands that the registration of a mark in the Patent Office confers no rights upon anyone. The rights, of course, are common law rights, and it is merely a question of registering so that an action can be brought in the United States Court even when there is not diversity of citizenship, and it enables a citizen of this country to register abroad. Many foreign countries won't register your trademark unless you register it in your own country. Now, in this matter of registration, the Patent Office, by statute, is directed to name certain classes of goods—to constitute certain classes of goods—I cannot accurately state the names of them, but illustratively, I can bring the point out—they 30 40

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10 have a class, I will say, of tobacco, a class of groceries, a class of hardware. Now, the law says that when a man applies for registration of a trademark he can have for one fee and upon one application registration for as many articles as are included in any one of those classes, but if he wants registration upon an article in another class, he must file another application and pay some more money. In the instant case the Patent Office simply took the ground that they were restricted on the question of registration by the fact that we had never used the mark on tobacco, or at least we had only used it on tobacco in 1919 for that formal sale, and the Lorillard Company had used it in 1915, and, therefore, they would not register it for us. The Patent Office held that they were precluded from going into these questions which we bring before the Court, that they had nothing to do except with the administrative execution of the law, and that was all there was to it. The Patent Office even intimated to us that we should take our grievance somewhere else, namely, to the United States Court, and so that was the way our registration proceedings in the Patent Office terminated, but they had served a purpose in bringing out the truth and removing that misrepresentation.

20 I stated to your Honor, I think, that it was immediately after the bringing out of these facts in the Patent Office that this pending suit was brought.

30 The Court: Is it your position that if there was no abandonment, you have no case?

Mr. Scott: No, not on scrap tobacco. And the only case that we conceivably could have would be, not upon the use of the word "Beech-Nut," which, of course, is the important thing, but it is conceivable that if it were worth while, we might have a case upon the use of the oval in connection with the use of the word "Beech-Nut." That is, that while there might not be a case upon the mere use of the word "Beech-Nut"—that they had a right to the use of that—they might not have had a right to use it in

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connection with our oval in a way such as to increase the confusion. But, broadly speaking, as to the important issue of the case, as to the word "Beech-Nut," if they had not abandoned it, we never could interfere with them in its use on the scrap tobacco, but it is not so clear to me that we might not have interfered with them on the cigarette, because that was going away from the precise article to which their title pertained, and it is not quite clear to me—

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The Court: Chewing and smoking tobacco?

Mr. Scott: Yes, chewing and smoking tobacco. That while ordinarily the right of one company established in one of those articles inures to his benefit in the other, it may well be that in the special circumstances of this case it would not be so, because their right in the scrap tobacco was limited strictly to scrap tobacco by our general right. They had not put the brand on cigarettes until long after we, the Beech-Nut Company, had so expanded our general rights as to cause the public to believe that cigarettes, if produced, would be ours. They allowed our reputation to pre-empt that field before they went into it.

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Now, to comment on the general situation a little as to what the evidence will bring out. During all of this period we contend that it was the privilege of the Beech-Nut Packing Company to go into the tobacco business if it wanted to, or to stay out if it wanted to. During the period, say, from 1910 on, after the business had grown big—I am more concerned with that period—after their reputation had grown to this wide extent—it was their privilege to go into the tobacco business, and to take the direct profit which they would get in the tobacco business, if they wanted to, or it was their privilege to stay out of the tobacco business and sacrifice those direct profits for the sake of avoiding that antagonism which they foresaw from that part of the community which is opposed to cigarettes and tobacco. They could do either one. It was

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10 a matter of business policy. As the testimony of Mr. Barbour will show, they saw plainly that cigarettes—tobacco—was a natural line of expansion for their business, and then he comments to the effect that I have explained, that the thing worked both ways, that there would be profit on the tobacco, but on the other hand there would be injury to the rest of the business. They had to choose between the two, and they chose keeping out of the tobacco business and concerned themselves with their general line of business. But what has happened now?

20 They stayed out of the tobacco business for the express purpose of avoiding this antagonism and injury, which the testimony will show your Honor is real and does exist. They stayed out of it for that purpose, they sacrificed the direct profits which they might have made from tobacco, and what have they accomplished? Nothing. They have not even kept clear of that criticism. The Lorillard Company has come in and taken the direct profits which they sacrificed and has imposed upon the Beech-Nut Packing Company the criticism of that part of the community which is opposed to tobacco or cigarettes, and there is also another part of the community which does not take such extreme views, but the testimony will show that there are some who have no objections to tobacco whatever but who criticize the Beech-Nut Company for putting out tobacco, because they don't think that is in the line of efficiency, putting out tobacco along with food products, and they criticized them on that ground.

30 So, we arrive at the question of damages in this case. Our prime purpose here is to protect our trademark, but we have to follow the law where it goes. We claim that we have an undeniable and indefeasible right to the protection of this trademark upon this record, as shown by the facts, and as supported by recent cases, some in this Circuit.

40 Now, the profits which the Lorillard Company has made out of scrap tobacco are profits which the Beech-Nut

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Company deliberately sacrificed for the purpose of avoiding antagonism. These profits the Lorillard Company has appropriated, and this antagonism the Lorillard Company has imposed upon the Beech-Nut Packing Company.

Now, I think, your Honor, that with that outline we will be able to approach the case.

Mr. Milton: For the defendant, if your Honor please, appear Mr. Gifford, of the New York Bar, Mr. Cavanagh and Mr. Meyers, together with myself. Mr. Cavanagh will make the opening statement to your Honor.

Mr. Cavanagh: If your Honor please, I have been associated and connected with this Beech-Nut matter practically since its inception.

The Court: In 1870 or 1866?

Mr. Cavanagh: Since the inception of this quarrel, if I may call it that, and I expected in coming here today to ascertain finally what the plaintiff's position is in this case. I have listened very attentively to Mr. Scott's discussion and I must confess I am puzzled and confused. I don't know whether these food products people want to go into the tobacco business or, whether, as they stated, tobacco is such an instrument of evil that it would be detrimental to them, and therefore they want to stay out of it. Do they want to come in or do they want to stay out? So I am afraid that I will have to simply give a brief statement of the situation as I understand it from my intimate connection with this case.

I will try to avoid all argument and stick coldly to the facts.

As Mr. Scott has told you, the Beech-Nut Packing Company is in the food products business. If your Honor will glance at plaintiff's exhibit board, which has been stipulated in here, from 1891 down practically to date you will find that every single one of those products on that board relates to a food product, or it relates to an article

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that comes under the Pure Food and Drugs Act. There is not a single article on there that has the slightest thing to do with the tobacco industry, which is a class by itself.

10 Now, if your Honor please, this Lorillard Company, as you may perhaps well know, and which the record will show, we will prove has never been engaged in anything in its whole career but in the tobacco business, and the history of the Lorillard Company is somewhat of a romance.

20 It was established in 1760 by old P. Lorillard. It is 160 years old, it is the oldest one and the largest tobacco concern in the industry, as the testimony will show this concern, and in comparison with Beech-Nut I might interpolate here that you have gotten the impression perhaps that this Beech-Nut Company is an enormous concern and that everything in this whole Beech-Nut business, whether tobacco or food, was built up by its efforts. Let us look at the history of what the Lorillard Company is. It is a concern 162 or 163 years of age. Its tobacco products include some of the best known in the world, it has the Murad, the Mogul, the Egyptian Deity, the Helmar, the Egyptian Trophies and the Beech-Nut Cigarettes. It has the famous Climax Chewing Tobacco, it has the Sensation and numberless brands, and the famous Beech-
30 Nut Scrap. It has, according to some of the testimony which will appear in this case, twenty-five branches in twelve different cities, including large branches right here in this district of New Jersey. It employs about 12,000 people, and it manufactures and sells, as the testimony will show, every possible tobacco product, except snuff. That is the kind of a concern that is putting out this Beech-Nut Scrap tobacco and the Beech-Nut cigarettes. Its whole life has been devoted to tobacco, as the record will show; it has nothing whatever to do with food products.

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The scrap tobacco package that is in issue here (and I might say it is one of the inducing motives of the quarrel), which your Honor will see—that is a ten-cent package of tobacco (indicating). We propose to show, and the testimony indeed does show, because it is by stipulation and not denied, that at the time of the patent office litigation to which Mr. Scott referred, the Lorillard Company was selling of this ten-cent item \$14,000,000 a year, or over 29,000,000 pounds, and that was exactly over \$2,000,000, or approximately, I should say, \$2,000,000 a year more than the total business of the Beech-Nut Packing Company in all its branches, the bacon, ham and eggs and what-not, the Beech-Nut gums, and matters of that sort. In that ten-cent package, without talking about the famous cigarettes, it was doing \$14,000,000 worth of business a year. 10

The testimony will show that that was the outcome, not of any trespassing or traveling upon the reputation of a food concern, or a bacon concern, or a ginger pop concern, but it was on the reputation of that great Lorillard Company, with its great organization, its hundreds of states' salesmen, district salesmen, city salesmen, and sub-salesmen, its whole force back of it. As witness after witness has and will testify, when a Lorillard man went with a new brand—for intance, Beech-Nut tobacco upon the market, and walked into a man's store, he didn't have to go in and say, "This is like the Beech-Nut tobacco," or "This is like the Beech-Nut food products." He went in, as the evidence will show, and said, "I am from P. Lorillard Company, the makers of the famous Moguls, the Helmars, and other brands; we are bringing out a new brand, it will sell like the others because it will sell on Lorillard's reputation," because as is the slogan used by several witnesses in this case, "Lorillard on tobacco is like sterling on silver." And that is the reputation Lorillard has, and that is the kind of concern they accuse of traveling on their bacon and eggs business. 20 30 40

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Now, if your Honor please, to get to the history of this. As Mr. Scott has well stated the matter, the evidence will show and develop in this trial that the business of the Beech-Nut Packing Company from 1891, when it was the Imperial Company, down to the incorporation of the Beech-Nut Packing Company and for several years thereafter, was comparatively small. I think one witness testified during that period from 1899 to 1903, that they cured some hams, and that they cut wood in the winter. In any event, the testimony will show they had one small building out in Canajoharie, New York, where they carried on this business.

In 1896, down in Kentucky, there was a large tobacco concern by the name of Harry Weissinger Tobacco Company—

The Court: What years?

Mr. Cavanagh: 1896. This concern was putting out brands some of which are famous today, such as the Burr-Oak, the Three States Mixture, and others, as the evidence will show. In the Patent Office proceeding, to which Mr. Scott has referred, and the evidence of which is in this case, it is admitted, as a fact so far as the early development of this business goes, that with Weissinger there was a man named Somers. In 1896 this Five Brothers Tobacco, which is an exhibit in the Patent Office case, and which was known in those days as a screw cut, or thread cut, was on the market, and Harry Weissinger wanted something to compete with that Five Brothers tobacco, so he brought out a brand of tobacco called Beechnut. There is one of the original Weissinger Beech-Nut labels which this man Somers, who made up the formula for the original tobacco, so far as the blending mixture goes, produced, and it is in evidence in this case.

That was in 1896, and that Beechnut wrapper which you will see there of the Harry Weissinger Company was

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right in a package like this (indicating Five Brothers tobacco), but they found out, as the evidence will show, and does show, that because the Five Brothers was a union tobacco and this Beechnut tobacco was a non-union tobacco, the Weissinger thread cut, that it would not sell in the mining districts. So in 1897, or rather, the latter part of 1897—that is correct, in the latter part of 1897, Harry Weissinger brought out what is known as a chewing and smoking tobacco, and in this case you will find the expression “scrap” used very often. This is one of the original packages with Harry Weissinger’s name on. 10

The Court: Is “scrap” used on that?

Mr. Cavanagh: It is was a scrap tobacco.

The Court: Does the word “scrap” appear there?

Mr. Cavanagh: No, it is called chewing and smoking. 20

The Court: All right.

Mr. Cavanagh: It says on it, “Superior quality, Havana cuttings,” but they usually call that a scrap tobacco, it is in small pieces.

He brought out that tobacco in 1898, and it was sold as the evidence shows, and we have the original records of sales to Arbuckle, J. Orrick Co., Allen-Kirkpatrick Ewart Co., and others. This very package was brought in 1919, or at the time of the Patent Office case, from a man in Cumberland, Maryland, who still had it in stock, and it was purchased from J. C. Orrick & Sons, wholesale brokers. The Weissinger Beech-Nut tobacco was sold all through Kentucky, Ohio, Indiana, Pennsylvania, and other places, according to Mr. Somers’ testimony. 30

In 1903, or the latter part of 1902 or 1903, the Harry Weissinger Tobacco Company, as the record will show, was purchased by the Continental Tobacco Company, the Continental being a part at that time or one of the fore-runners of the American Tobacco Company, and the brand 40

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after being put up by the Continental, as the record shows, for a short while, was transferred to Luhrmann & Wilbern Tobacco Company, of Middletown, Ohio.

If your Honor will please bear that name in mind—the record in this case shows it is quite important because matters start there.

10 The Luhrmann & Wilbern Tobacco Company was a subsidiary or one of the affiliated concerns of the American Tobacco Company, of what was commonly called the old combination, subsequently dissolved by the Supreme Court. The Luhrmann & Wilbern Tobacco Company continued to put out and sell this tobacco from 1904 until 1910. Now, litigation in connection with the dissolution of the old American Tobacco Company began about 1908, and it continued until 1911, when the latter part of the year the decree of the Court was made final, partitioning out the various companies, and by that decree this
20 Luhrmann & Wilbern Tobacco Company, as we propose to show, was apportioned out to the P. Lorillard Company, together with all its capital stock and its property, its buildings, its trademarks, and its brands.

In the work of preparing this dissolution, apportioning this matter out and straightening out the mess in general, a list was prepared in 1911 going with the decree and carrying out the purpose of that decree, conveying the various brands of the Luhrmann & Wilbern Company
30 over to the P. Lorillard Company, and upon that list, amongst the other brands, as we propose to show, was this Beechnut brand.

Now, your Honor will understand that the tobacco business is a very peculiar one. It has its rises and its falls, a brand comes up and a brand goes down, and it is necessary for the tobacco manufacturer to keep a constant watch on his market, to push his brand as much as he can and when the public taste changes from a sweet tobacco to a rough tobacco, and vice versa, for instance,
40 he has got to watch that change in the market.

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In those days there was a big brand made called "Honest"; it was a tremendous seller, and in proportion, as we propose to show, the sales were just as great—

The Court: The Honest Long Cut?

Mr. Cavanagh: The Honest Scrap, and this Honest Scrap was at that time the reigning king in the market, the same as this Beech-Nut scrap is today. It was sold by millions of pounds, and I think in facts and figures the record will show it was as large as this Beech-Nut. But, as in making the curve of a chart, it has a rise and then as the taste began to change, in tobacco, as in the case with all articles, and the sales began to drop, it became necessary to put up another brand. We propose to show by officials of the Lorillard Company that following their usual practice—and it is the practice of all tobacco men, they went to their reservoir of the brands that they used, their living brands, they went to their lists of brands which had been given to them and which were contained in that decree of the Court, or rather, were apportioned out to them by the decree of the Court, and in looking at the list of scrap tobaccos, they found certain of them were on the market, so they could not select those names, and they selected the Beech-Nut name because it was their own mark. I won't say select it, but simply put that mark on the goods, because it was their own mark. So we propose to show without any argument at this point there was never any abandonment of this mark, that this came from Luhrmann & Wilbern to the Lorillard Company and was used by them in conformity with the decree of that District Court following the decision of the Supreme Court of the United States, dissolving that old combination.

So Lorillard then, in 1916, put out this brand, and they followed, as I have briefly touched upon, and as the evidence will show, they followed the usual procedure in what I might call, in the vulgar parlance of the day, of plugging all their brands with their enormous resources

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of their organization, and not paying any attention to any Beech-Nut food products.

10 On that brand the first year, I think the sales show that it ran about 1916 to 7,000,000 pounds and in 1919, at the time of the Patent Office litigation the sales amounted to 29,000,000 pounds with a value of over \$14,000,000. So much for the history of the tobacco. Now, I think we had better at this time, as we perhaps should show, and in fact the Patent Office records of this case does show, how the present situation arose. In 1915, as Mr. Scott has stated, the Beech-Nut Packing Company knew that this Beech-Nut scrap was on the market, it was a big seller, so in June, 1915, they wrote to this Lorillard Company protesting. In order that there may be no sins of commission or omission, with your Honor's permission, I would like to read some of these letters, which both sides
20 admit are genuine.

The Lorillard Company on September 15, 1915, wrote back explaining how they came to have the ownership of this mark, and at that time, September 15, 1915, they notified the Beech-Nut Packing Company that under the decree of the Circuit Court of the United States (this is quoting from the letter), for the Southern District of New York, the so-called tobacco combination, which included the American Tobacco Company, was split up. In this—

30 The Court: What page?

Mr. Cavanagh: On page ten, if your Honor please, the letter to Mr. Barbour.

The Court: All right.

Mr. Cavanagh: In the second paragraph.

The Court: All right.

Mr. Cavanagh: "In this disintegration proceeding the Luhrmann & Wilbern Tobacco Company, which had always been maintained as a separate entity, was acquired
40

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by P. Lorillard Company. In the meantime some of the brands formerly manufactured by the Weissinger Tobacco Company had been taken over and manufactured in the Luhrmann & Wilbern factory in Middletown, and after the acquisition by our company of the Luhrmann & Wilbern business, including these brands, we continued to operate it as a separate company until about two years ago, when we disssolved it, taking over all of the business and brands directly in our own name." 10

Now, that shows at least, and the record will, that in 1915 they were notified, the Beech-Nut Packing Company, this plaintiff, was notified of Lorillard's position. That matter was dropped, any discussion of the whole situation was dropped from 1915 until 1919.

Now, in the meantime, as this testimony shows, and as will develop in this trial, during those four years, Lorillard satisfied that this letter had been satisfactory was putting all its tremendous resources in the promotion of all that tobacco, and it grew by the millions of pounds until its business exceeded the Beech-Nut Packing Company's total business, and this Beech-Nut Packing Company stood by and let that business grow. We will show the enormous amount of money we invested in advertising, in machinery, in missionary crews, in the sales department and in all the methods that a great organization like the Lorillard Company uses in promoting the sales of its products; that this was all with the knowledge of the Beech-Nut Packing Company; that they stood by and let that business grow without any further protest until it exceeded their total business, this poor ten cent piece of scrap. That is all in the record. 20 30

Now, we will come down. Everything was slumbering peacefully, as the testimony shows, in 1919.

In 1916 (as I think some of the stipulations show), or thereabouts, I am not certain about the date, the Lorillard Company proposed to bring out a cigarette to follow in the footsteps of this Beech-Nut scrap, which was a great 40

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10 seller. We will show that that is common in the tobacco business, and your Honor knows one of the best examples of it is the Lucky Strike smoking tobacco and the Lucky Strike cigarette. So they proposed to use the same scheme, to have the Beech-Nut cigarette travel along on the reputation of the Beech-Nut Scrap, as a number of witnesses have testified, and as will appear in this case. The Beech-Nut Packing Company, my recollection is, in some way became acquainted with this fact that the Lorillard Company proposed to put out a cigarette and, as these letters will show, the first thing that Lorillard knew was that the Beech-Nut Packing Company was on the market or expected to come on the market with a cigarette. So the Lorillard Company wrote to the Beech-Nut Packing Company, and that letter, your Honor, is very interesting.

20 The Court: What page?

Mr. Cavanagh: On page 15.

The Court: All right.

30 Mr. Cavanagh: In that letter the Lorillard Company refers to the correspondence of four years ago about the Beech-Nut Scrap and then goes on to state, "On your part," I will quote from the letter, "there the matter was dropped, you having made no further reply or objection. On our part we have continued the manufacture and sale of tobacco products under the trademark 'Beech-Nut' until today it is one of the leading tobacco trademarks in this country.

"On or about the 17th of this month information came to us of small shipments to two jobbers in this locality of cigarettes bearing the trademark 'Beech-Nut' and your name, but manufactured by The American Tobacco Company. Our counsel immediately by phone took the matter up with Mr. Junius Parker, counsel for the Tobacco Company, and, on being told by Mr. Parker that the Tobacco
40 Company did not claim any title to the trademark, but

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was manufacturing cigarettes under it for your account, our counsel asserted our ownership of the trademark for tobacco products and demanded that the Tobacco Company cease making these cigarettes. We now have Mr. Parker's letter dated June 25th, 1919, stating that the Tobacco Company has 'easily and definitely concluded' not to manufacture any tobacco products under the name 'Beech-Nut.' We do not enclose copy of this letter, as we take it for granted that the Tobacco Company has made you fully cognizant. 10

"We very much hope that further consideration will bring you to a like conclusion, as we must and do insist that you respect our rights and cease using 'Beech-Nut' as a trademark for cigarettes. You have never heretofore used this trademark for tobacco products. Indeed, you have never heretofore manufactured or sold any tobacco products, but always goods of an entirely different class. 'Beech-Nut' has been used by ourselves and our predecessors in title for many, many years as a trademark for tobacco products, and under numerous decisions this gives us ownership of the trademark 'Beech-Nut' for cigarettes." 20

So it was the Lorillard Company that went after the Beech-Nut Company to cease going into the tobacco business.

Now, Mr. Scott has adverted to some negotiations that then took place, about the question of the character of the labels, and we will submit that those negotiations were directed to a question of some minor details of changes in labels, and as Mr. Scott has stated, the question came down to who should pay for the changes in the labels, the \$10,000 worth approximately. But while the negotiations were still on the Beech-Nut Packing Company—I hardly know the expression to apply to the actions—without stating anything to Lorillard, put out these fake orders of cigarettes (as the Patent Office decision found it was not a genuine sale), and rushed into the Patent 30 40

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Office in the attempt to register that trademark for cigarettes, which of course is a tobacco product.

Now, the effect of such a registration, as your Honor is aware, is to give the Registrant *prima facie* evidence of ownership, that is, the right to exclude others, *prima facie* right, at least, and neither the Lorillard Company
10 nor its counsel knew anything about that application for registration until it appeared in the "Official Gazette." The application for registration was filed about July, 1919, and in the meantime we had received or had, shortly after that time, a letter as the record shows, from the Beech-Nut Packing Company, which is very interesting. This was shortly after they filed this application for registration without our knowledge, and while these negotiations were going on. This letter is from B. Arkell, President of the Beech-Nut Packing Company, to Mr.
20 Thomas J. Maloney, President of P. Lorillard Company, page 23, your Honor. He says:

"Dear Mr Maloney:

"I am enclosing letter addressed by our counsel, Mr. Offield, to my son, William Clark Ardell, in reference to the Beech-Nut Stogie Company, thinking that you would be interested in same."

On page 22 appears this letter, and these letters will give you a better idea than anything else of the situation.

30 "July 22nd, 1919. Mr. W. C. Arkell, care of Beech-Nut Packing Company, Canajoharie, New York. In re Beech-Nut Stogie Company.

"Dear Sir:

"In reply to your letter of June 10th, the fact that you were aware of the existence of the Beech-Nut Stogie Company and have actually filled their orders with your goods without making any complaint will, of course, have a bearing upon the question of damages in the event you sued them, but I doubt if it would have any
40 bearing upon your right to stop the use by them of your

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mark. Of course, the time to have taken the matter up was upon the first shipment but that is now past and I think it would be a good idea to call this matter to the attention of the Lorillard Company and let them take steps against the Beech-Nut Stogie Company as they are in a much better position to do so than the Beech-Nut Packing Company."

That letter was forwarded to us for the purpose of bringing action against the Beech-Nut Stogie Company, and in that connection, and in rapidly passing, your Honor, the record shows that from 1915 on, and with the knowledge of this Beech-Nut Company, the Lorillard Company had stopped others or had caused others to stop putting tobacco products on the market under the name of Beech-Nut.

Now, we are down to the record in this Patent Office case. The testimony in this case is, and there are two volumes about that size (indicating)—the present action is practically a rehash or a continuation along practically the same lines of all that went on in the Patent Office. In other words, I think that this Court is getting installment No. 2 in this case. Testimony was taken, large briefs were filed, and the argument was had, and the decision which has been referred to in this case of the Examiner of Interferences—he held so far as the right to the word "Beech-Nut Tobacco" went, that tobacco was not in the same class of goods, was so radically and diametrically different from food products that there was absolutely no connection between them; and under the decisions in the cases, and under our American law here, and under the law of practically every country, that the Lorillard Company had the right to the mark, and the Beech-Nut Company did not, and therefore the Examiner of Interferences refused to register the mark for the Beech-Nut Packing Company. The Examiner of Interferences did hold, on reasoning which we think is erroneous, but that

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is neither here nor there, he held there was an abandonment of this earlier Beech-Nut brand, but his holding was that even our 1915 use gave us the right over anything the Beech-Nut Company ever had, because they were never in the tobacco business. The Beech-Nut Packing Company appealed that case and it went to the Commissioner of Patents. It was intended to be argued out on all points, but the Commissioner of Patents, finding at the start of the case, and the decision is recorded in the Commissioner's decisions for the year 1922, page 9, and the report of it I hold in my hand, he held that as the Beech-Nut Packing Company had never made any use of the mark, such as to entitle them to registration, and that nothing the Beech-Nut Packing Company ever had shown in their old trademark registration was such as to give them any right to register for tobacco, and he affirmed the decision of the lower court, or the Examiner of Interferences, and refused to pass on the other questions, such as questions of abandonment and the like.

I will read a short paragraph of that decision because of its continuity. This case is so heavy that we want the Court to get a bird's-eye view of it, if possible. The Commissioner in his decision said, "Applicant has established" (that is the Beech-Nut Packing Company), "that it was using Beech-Nut as a trademark for a large number of miscellaneous articles, saying: 'The Beech-Nut Company in using its own label on cigarettes was operating within an exclusive right it has always had; this being so, neither the extent nor the method of exploitation of cigarettes is of any legitimate interest to the opposer.' " Then the Commissioner said, "Applicant seems to argue that inasmuch as it was employing a trademark on one class of goods it was free at any time to employ that mark on another class of goods, and that in order to obtain registration in the second class of goods it was not necessary to carry on a business as to the second class of goods.

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This argument is not supported by any cases I can find and does not seem sound. A trademark right grows only from use in a business, and the use of a mark in one business does not afford sufficient foundation for registration of the mark for another business."

So that decision affirmed the Examiner of Interferences, and we were through the Patent Office with two decisions in favor of P. Lorillard Company. 10

There still remained the step of an appeal to the Court of Appeals for the District of Columbia, but no such appeal was taken by the Beech-Nut Packing Company in the Patent Office case. The whole matter was dropped. They did not avail themselves of the right of appeal, and the adjudication of the Patent Office became final. Now, that brings us to this point, if your Honor please, and I can't stress it too much (as the record will show, and as it will develop in this case) of the radically different classes of business, I might say here and pick them off to save time, that in addition to that decision of the Patent Office in favor of Lorillard as to the different class of goods, that it has been stipulated in this case that tobacco does not come under the Pure Food & Drugs Act, tobacco for smoking and chewing, but that chewing gum does, and that tobacco comes under the Internal Revenue Law, but chewing gum does not. It has been held, as we will show and as appears, and I don't like to refer to decisions, but I will simply state briefly it has been held by the courts for years, that tobacco is not a food product, that it is a narcotic, that it is not taken into the stomach to build up the bodily system, but it is liable to be detrimental, if it has any effect at all. Those decisions were rendered in cases and they are referred to in the records, in cases in what I might call the Blue Law or Bluenose States, or whatever they are, where they tried to sell tobacco on Sundays along with drugs, foods condiments and other necessities, candies and confections, and all of those years the courts 20 30 40

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have said, "No, you can't sell it, tobacco is a luxury and not a necessity; it is not a food." That is the holding of the Courts.

Then, we have the official classification in the Patent Office, tobacco products are classified in Class 17 as "tobacco products," which includes smoking, chewing
10 tobacco, cigarettes, cigars Tobacco has no genus; it is a thing by itself; you can't name any class it belongs to, because tobacco is tobacco. Food products are classified in the Patent Office, as we will show, under Class 46, "foods and ingredients of foods."

We will further show in this case that every famous tobacco mark has been registered, or practically every famous tobacco mark, or one that will occur offhand to you has been registered time and again for other articles.

We propose to show our own famous Climax tobacco
20 has been registered over 100 times for foods and every staple article under the sun. The same with the Lucky Strike, the Omar—

The Court: Under what classification is chewing gum?

Mr. Cavanagh: Under Class 46, Foods and Ingredients of Foods. It comes under the Pure Food Law. The rulings have been to that effect, and there have been prosecutions in cases where chewing gum has not been what I might call up to standard under the Pure Food & Drug
30 Act.

We propose to show in the case, as I have touched on, that no manufacturer of tobacco ever engaged in the manufacture of food, and no food manufacturer was ever known to engage in the manufacture of tobacco.

We propose further to show that the class of people that use scrap tobacco, chewing tobacco and usually cigarettes are entirely a different class; you don't find an eight-year-old child, as the record will show, or a woman, going in to buy Beech-Nut food products and coming out and coming down the street with a package
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of scrap tobacco; you don't find a woman or a child chewing scrap tobacco; it is used by grown-up, red-blooded men. There may be some men that use chewing gum steadily, perhaps to cover up something else. So that all the circumstances indicate that tobacco has nothing to do with food, the two lines are distinct, and one reason we propose to show (and this is going to be very important), by officials of the tobacco company, born and brought up in the business year in and year out, for over a generation, is that this tobacco industry is one of the most highly specialized and technical industries in the world. From the time that the tobacco is sown in the bed, the tender plants transferred to the field, from the time the tobacco is gathered up in the barns and treated, special processes, special machinery and special knowledge are required to successfully make any tobacco products, and a man has got to know that business as he has to know no other in the world. That is the reason, as the Lorillard Company (as mentioned by Mr. Scott), told the Beech-Nut Packing Company that it would be a detriment to the Lorillard Company to ever let the public know or get the idea that a food product concern making jellies and marmalades was making tobacco, because the situation in the two businesses is entirely different.

We propose to show also that in the world at large, in the stock market, tobacco is regarded as entirely different. Pick up the daily papers and you will see a list of stock, steel, oil and tobacco stock—

The Court: Tobacco is way up, I suppose. (Laughter.)

Mr. Cavanagh: So all those factors, court's classification, class of users, and everything else, go to show your Honor there is absolutely no connection between the tobacco and food. If upon attempt to stretch food products to cover tobacco—in doing that you are going to ask for the wreckage of the whole trademark system of this

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country, because the minute you do it every tobacco company that has a Climax or an Omar or a Mogul or an Egyptian Deity or a Helmar will go after all the other fellows using that name for other and different products and you will have confusion worse confounded.

10 We also want to briefly explain to your Honor in regard to these numerous depositions here. I feel we should apologize and, therefore, I am going to endeavor in the trial of this case and preparation of briefs to simply select a few examples. Mr. Scott has spoken about how they all show confusion. Well, we propose to show in this case that by their own witnesses, as the evidence will show, people were absolutely astounded that the Beech-Nut Packing Company should ever consider going into such a widely different line as tobacco, and one witness in particular, or one that I recall, was asked, "Don't
20 you think they are the same line business?" He said, "I consider them diametrically opposite. What do you take me for, a fool?" "You can get along," and I am speaking extemporaneously on this point—"You can get along without your tobacco, you do in the hospitals and jails, but you can't get along without your baked beans, and I am surprised the Beech-Nut Packing Company ever went into such a diametrically opposite line of business."

30 Mr. Gifford: If your Honor please, I would beg the privilege of reading another portion of this letter that Mr. Cavanagh has not read, apropos of the charge of our adversaries that the Lorillard Company suppressed anything.

The Court: What page is that?

40 Mr. Gifford: On page 10. In the first letter that the Lorillard Company wrote they stated in a general way that this company and its predecessors in ownership of this brand have used it continuously since prior to 1898, as shown by the records in the office. Now, that was

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true, because although there were not orders for it at a certain time, in that period, they were always ready to supply any orders that were received, but the correspondence on that subject did not stop there. In the letter from the Packing Company, on page 8, they asked for a bill of particulars in substance, of what the Lorillard Company professed to have. They said:

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"We will greatly appreciate it if you will send us samples of your product showing the manner of use of the word 'Beech-Nut' since the year 1898, copies of advertisements or of letterheads showing your use of this name. We trust you will consider this a fair request as we would like to reach a prompt and friendly termination of the correspondence on this subject."

Now, did the Lorillard suppress anything? In the letter of September 15, 1915, commencing on page 10, the first paragraph is as follows:

20

"I have been able to locate some old price lists which contain our Beech-Nut Scrap Tobacco, and enclose them herein. I am also sending you an old package showing the use of the name 'Beech-Nut' and our present package."

There they furnished them with a price list, the old package and the new package. Now follow two paragraphs as to the chain of title by which this thing came down to them, and then they continue, on page 11:

30

"I give you this history so that you may understand the various price lists in the name of Luhrmann & Wilbern Tobacco Company and the package in the name of Harry Weissinger Tobacco Company. I do not know the exact date of the old package, as the stamp is not legible, but it was prior to 1903."

"The price lists that I send you are dated January 2, 1904; May 6, 1907; July 1, 1910, and November 3, 1910."

Now, that was the evidence that they had. They turned it over to the Beech-Nut Company, and they made a clean breast of the whole matter, and that evidence will be re-

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peated or has been repeated on the trial, or in the testimony taken by a commissioner.

Now, then, they go on to say, and this is a disclosure of the case that we made here, practically, for you can take this letter and you can see the defense to this suit at the present time—they say:

10 “It is difficult for me to see how any one can claim that there is any similarity in our products and yours, or in your label and ours, other than the name ‘Beech-Nut.’ Your claim that we would not have the right to use the name ‘Beech-Nut’ on tobacco products must find its basis in the idea that you can appropriate the name ‘Beech-Nut’ for all products of whatever character.

20 “That the law does not permit of such a claim is elementary. If your claim were maintainable, then the Lion Brewery in New York could enjoin the manufacture of Lion brand collars, or vice versa. Suppose that the J. B. Williams Company should tomorrow put out a new brand of shaving soap, called ‘Beech-Nut.’ Do you argue that you could stop it because you have first used the name on hams and bacons? It seems to me that your argument must lead to this conclusion. The law of unfair competition, so far as it assumes to protect the public, assumes to protect the purchaser of average intelligence. It is difficult to believe that a person of average intelligence who enters a store for the purpose of buying ‘Beech-Nut’

30 hams or bacon could be deceived into thinking he was getting either if he were handed a package of ‘Beech-Nut’ chewing tobacco, or that the ‘Beech-Nut’ chewing tobacco was manufactured by the manufacturer of the hams and bacon. It is no more the custom in this country for a packer to manufacture chewing tobacco than it is for a manufacturer of beer to manufacture collars, and the purchaser of average intelligence perfectly well knows this.”

40 Now, they go on very much to the same effect and quote, even cite cases, and a text book on the subject, so that

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the Lorillard Company instead of suppressing anything, here in 1915, made a clean breast of the whole matter, and then the Beech-Nut Company came back with this letter, "Your letter is a very interesting one, and before giving a definite reply to same, desire to review the matter as presented by you so that we can give you an intelligent reply." They never did reply. This letter was the end of the correspondence in 1915, until it was resumed again way on in 1919, and this letter of 1915 continued:

"At this time, however, we may express our agreement with you that the name Lorillard carries with it a vast amount of good will and unquestionably a guarantee of excellence. So does the name 'Beech-Nut Packing Co.' and we take the view that the increase in sales of Beech-Nut Scrap Tobacco is due to the exploitation of the name 'Beech-Nut' with the oval label, and we cannot help but assume that the general impression is that these goods are manufactured by this Company rather than by Lorillard, at least to a considerable degree, for since writing you last we have another inquiry," and so on.

What I read this for is to refute any impression that your Honor may have that there was any suppression or attempt to suppress the situation on the part of Lorillard. They made a clean breast of it, and when the correspondence stopped there with this letter of the Beech-Nut Company the Lorillard was permitted to build up this enormous business in the manufacture of this Beech-Nut chewing tobacco, which they now attack as an infringement, and which we say they are practically estopped from attacking by reason of the attitude that was assumed in that correspondence.

Mr. Scott: Do I understand the opening statements are concluded?

Mr. Cavanagh: Yes, sir.

PLAINTIFF'S PROOFS.

Mr. Scott: We didn't anticipate having time for witnesses this morning, but the testimony of a great many of these witnesses which was taken by deposition we wish to present to your Honor, and we can very probably use the remaining part of this session to permit the reading of some of these depositions.

10 The Court: Do you intend to read all the depositions?

Mr. Scott: No. I have prepared, your Honor, in this pamphlet extracts for the purpose of relieving us from reading this big record, and I thought that possibly it would be of assistance to the Court if I have a copy of this bound up for the Court, containing largely the parts of the testimony, maybe not all of it, that we rely upon, and I can furnish the other side with a copy, and that would relieve us all of a great deal of the burden imposed by that big record.

20 The Court: How much reading have you got?

Mr. Scott: Well, I could spend an hour or two very profitably presenting this testimony from these depositions.

The Court: You won't have any witnesses here today?

Mr. Scott: Pardon me one moment. (After consultation): About three o'clock was fixed for the earliest witness. There is a great deal of matter which we will have
30 to get before the Court at sometime in the case, and so I would suggest if it is agreeable to the Court that we use this time until we get our witnesses to present some of this testimony which we have here.

(An adjournment was thereupon taken until 1:45 P. M.)

DISCUSSION.

AFTERNOON SESSION.

Mr. Gifford: If your Honor please, I think that we shall object to the other side reading selected excerpts from the depositions. If they want to read particular depositions, I suppose they have a right to do so, but I don't think they have a right to read a portion of the deposition, without reading the whole of it. If they should do so and gain the benefit that I suppose they desire to gain, it would necessitate our reading the whole deposition afterwards, perhaps. It does not seem to me that that is the proper method of procedure. It is, of course, proper to read portions of the depositions in the summing up of the case, but not in presenting the evidence, it seems to me. 10

Mr. Scott: Then I will await the Court's pleasure on that. 20

The Court: Why is it necessary to read the depositions at all? I will have to read them all. The fact of your reading them won't help me much. I can't remember them all.

Mr. Scott: No, but presenting these depositions at this time gives more continuity to the whole case.

The Court: Have you abbreviated them very much?

Mr. Scott: I have not paraphrased them a particle. Simply omitted formal questions. I have left out the abundance of questions which are sometimes asked in a vain effort to get nothing; I have left out those, and I have simply copied out, as I conceived the meat of these depositions. 30

The Court: Well, counsel objects, and I suppose he is entitled to insist that they be read in their entirety or not at all. I am not very much in favor of reading a lot of depositions. It will take two or three days of reading. 40

PLAINTIFF'S PROOFS.

Mr. Scott: You would prefer excerpts to be presented as the argument proceeds?

The Court: In the oral argument you are entitled to do that.

10 Mr. Scott: That would be the natural order. I am only suggesting this as a makeshift to meet the delay in getting our witnesses. That was the only thing that prompted me to suggest it at all. It would have been more fortunate if we had come to that understanding in the morning.

The Court: How many witnesses have you altogether?

Mr. Scott: Probably eight or ten of them.

The Court: And the other side? Have you any idea?

20 Mr. Cavanagh: We expect to have about seven or eight, if your Honor please.

Mr. Scott: I don't suggest that with any other idea than to fill up this little time. I think it is much the best order that the Court suggests.

The Court: Well, I am willing to wait around for awhile until your witnesses come.

Mr. Scott: Very well.

The Court: They will be here shortly?

Mr. Scott: I hope to have one here before three o'clock.

30 Mr. Gifford. I might further say, if your Honor please, that defendant makes the general objection to so much of the commission testimony of the plaintiff as is hearsay and incompetent. I don't think it is necessary to go into that specifically. I think it is sufficient to make the general objection.

The Court: I suppose the objection appears through the record?

40 Mr. Gifford: No. I understand it is proper practice to reserve objections until the depositions are read and

DISCUSSION.

since they are not to be read, the only thing I can do is make the general objection, simply because we don't wish to appear as acquiescing in the admission of hearsay or other incompetent evidence.

Mr. Bulkley: That raises the question, your Honor, as to whether my brother Gifford is right in his proposition as to when the objection should or must be made. 10

The Court: I am not going to rule on that. Some questions may be relevant, some irrelevant. I cannot tell unless my attention is called to each particular question.

Mr. Bulkley: We would like to be heard as to whether they are too late in making the objection. We think they are.

The Court: You may note a general objection to hearsay testimony. I will overrule it.

Mr. Scott: In that connection, your Honor, this testimony, probably, that Mr. Gifford has in mind is of these witnesses, several hundred on both sides, more upon defendant's side than upon plaintiff's, who were retail dealers, and questions of this nature were asked, almost in the same words, of witness after witness, running into the hundreds: "Did you ever hear your customers make any comments which led you to believe or gave you the impression that those customers were under the impression or belief that the Beech-Nut Scrap Tobacco or the Beech-Nut cigarettes were the products of the Beech-Nut Packing Company?" That is the question undoubtedly that runs in Mr. Gifford's mind in making this objection. Now, that question is addressed in about that form to every one of defendant's witnesses, and of course, if an objection is to be entered, we will enter one simply to save our rights, and I will therefore make this objection here and now to that part of defendant's testimony which consists of hearsay, the objection being general in form, as was the one made on behalf of defendant, and the objection being 20 30 40

PLAINTIFF'S PROOFS.

made on behalf of plaintiff merely to save its rights and to ensure equal treatment in the disposition of the testimony of the two parties. And I think it might be profitable, as the question will occur to your Honor in reading this record, to discuss that matter to some extent, as to the propriety of those questions. We have assumed
10 all through this case that no objection was to be made, and during the taking of plaintiff's depositions no objection was entered, and then defendant proceeded with about two or three times as many witnesses as plaintiff examined, and he asks precisely the same question, and we, in turn, did not object.

The question at issue here, as it appealed to us while we were taking the depositions, is analogous to a question of reputation—what is thought of a man, not what is the man's character or what is the man's conduct or
20 acts specifically, but what is his reputation, what do people think about him. And analogously, we have here a question what do people think about this trademark, and we without any investigation, none appearing necessary, without any investigation of the law—each party seeming to act upon that theory—these depositions were taken in that form, and it does seem to me by analogy that—without the ability at this moment to cite cases—this should be exempted out of the hearsay rule upon the same theory that testimony about a man's reputation is. It is entirely
30 a question of the state of the public mind.

The Court: I overruled the objection made by the defendant. Do you want me to change it.

Mr. Scott: Well, if your Honor is disposed to overrule it, I will withdraw mine.

The Court: I will overrule his objection. If you want me to overrule yours and give you the same standing—

Mr. Scott: We will all be happy. We expect a witness in a few moments. I will utilize those few moments by
40 reading the deposition of a witness for the plaintiff,

READING DEPOSITIONS.

Jefferson D. Hayden, which appears at page 754 of the plaintiff's record.

(Mr. Scott reads deposition.)

Mr. Scott: That deposition is representative of a great many. That was a dealer. Now, here is the testimony of a butcher in Chicago, a man who likes to chew tobacco. A. V. Bobb of Chicago. His deposition is at page 473. I think the first part of it is of interest. 10

(Mr. Scott reads deposition.)

Mr. Scott: At page 550 of plaintiff's record, there appears the deposition of Carl W. Nemetz, of Milwaukee.

(Mr. Scott reads deposition.)

Mr. Scott: On page 437, deposition of Mr. Arthur E. Fechter, of Chicago.

(Mr. Scott reads deposition.)

20

Mr. Scott: On page 617 is an example of a witness who was under deception, I think, for six years, if I remember right.

(Mr. Scott reads deposition of Oscar Joseph, of Toledo, Ohio.)

Mr. Scott: Deposition of Adam Sattig, Milford, Connecticut, page 291. He brings in a new element into the situation.

(Mr. Scott reads deposition.)

30

Mr. Scott: And here follows a long dispute of counsel on the record which I take it my opponents will excuse me from reading. A question was objected to as immaterial and, after an exchange of remarks, the deposition closed.

40

PLAINTIFF'S PROOFS.

JOHN M. HATTER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live?

A. Canajoharie, New York.

10 Q. By whom are you employed?

A. Beech-Nut Packing Company.

Q. How long have you been employed by that company?

A. Four years the 2nd day of May, 1924.

Q. Tell us briefly what the general nature of your duties is.

20 A. Partially my duties are in the sales department, but mostly in guide work, I have charge of a number of the guides in the summer time, more in the summer time than in the winter.

Q. About how many in the summer?

A. Probably six or eight in the summer time, and sometimes more. We take some out of the various offices at times so we can get them through.

Q. Where is the factory located with reference to the Mohawk River?

30 A. Well, the plant itself lays on the south side of the Mohawk River, what is now termed the Barge Canal.

Q. What road is on the opposite or north side?

A. The road leading directly from Albany to Utica, it is right on the straight road.

Q. Is that a main thoroughfare over which the automobilists pass back and forth?

A. Yes, sir; it is.

Q. Is the Beech-Nut plant in sight of these automobilists who are passing up and down that road?

40 A. Yes, sir; the Beech-Nut is, and it has a big sign on the plant, "Beech-Nut Packing Company."

JOHN M. HATTER—DIRECT.

Q. Have you got a little cottage quite adjacent to that road?

A. Yes, sir.

Q. In which are displayed the Beech-Nut products?

A. Right along that road, it is a very short ways from the Beech-Nut Packing Company.

Q. It is on the north side of the river?

10

A. It is on the north side of the river? Yes, sir.

Q. And adjacent to this main thoroughfare?

A. Yes, sir.

Q. What is there displayed to the automobilists that causes them to stop and visit this place, an invitation, is there?

A. Yes, sir; there is a sign across the road that reads, "Welcome; The Beech-Nut welcomes you," or something to that effect, asking them to stop, and—

Q. Who is in attendance in this cottage?

20

A. We have a couple of young ladies in there.

Q. What do they do?

A. Their duties are to display and show the people when they come in, the various products that we put out, and explain to them in a measure how they are put up, and the way they are put up, and we have them there also to sell, if they want to buy anything.

Q. Do they seek to induce the people to go across the river and visit the plant?

A. Yes, sir; they extend them that invitation to go across the river.

30

Q. Urge them to go?

A. Urge them to go; yes, sir; they do urge them to go.

Q. Now, when they come over there on the south side and into the factory, what happens?

A. They are, well, when they first come in they approach the telephone desk, what we term the telephone desk or information bureau.

Q. And then they get one of you as a guide?

A. Yes, sir.

40

59

PLAINTIFF'S PROOFS.

Q. Then what do you do?

A. We take them through the plant and show them through.

Q. I wish you would just tell us briefly, I don't want to have you go into too much detail, what do you show them and what do you say to them, particularly in connection with sanitary conditions and cleanliness and quality? What do you show to them and what do you say to them—and before I get to that, let me ask you a question: Do you know whether the company advertises in advertisements and general distribution of advertising matter requests that people stop there?

A. Yes, sir; people.

Q. I have mixed that up with my other question. Tell us just what you inform these people as you take them through, what you show them and what you sell them, particularly in connection with quality of the goods being made and the cleanly sanitary conditions under which they are made and packed for distribution.

A. The first thing we do, we take them into the bacon department, the bacon department where the bacon is smoked. We show them the smoking process and we impress on them the fact that we use hard wood.

Mr. Milton: I move to strike that out, if your Honor please.

The Court: Strike that out, what you impress upon them. Tell us just what you say to them.

Q. You said impress upon them, they asked you to tell what you told them which created that impression.

A. I tell them that the wood we use is hard wood, of beech, hickory and maple, it gives a better flavor than some of the other woods to the bacon, and from there we tell them that the bacon is in there five days until it is thoroughly smoked through. From there we take them to the skinning room where the backs are skinned off; from there we take them to the coolers.

JOHN M. HATTER—DIRECT.

Q. That is, you are showing this all to these people?

A. Just as I am showing a party through the plant.

Q. And telling them these things which you are relating?

A. Yes. We explain to them what the cooling process is—as we take them into the room where the meat is cut, the bacons are cut, we explain to them we have to chill that thoroughly, as these knives go through there at 540 slices a minute, they cut 540 slices a minute. If this was not chilled through they would not cut as evenly and smoothly. Let's see. From there we take them over to where it is packed in the boxes and in the glass and in the meantime we tell them that to insure cleanliness in every way, as far as possible, we have a manicurist there that is paid by the Beech-Nut Packing Company, and every one of the young ladies or young men who comes in contact with the products, any of the products that we put out, must have their finger nails manicured twice a week, and the young lady that attends to the manicuring also sees that everyone of those have their finger nails manicured twice each week. 10 20

Then we take them up into the gum wrapping, where the gum is wrapped. We show them the machines that wrap the gum, we explain how the gum is wrapped. From there we take them over to the place where the chicle is. We explain to them that that is the basis of all Beech-Nut gum, and we also explain to them that the dirt is all extracted from the chicle. 30

Q. Do you explain to them how it is extracted?

A. Yes, we explain—

Q. Tell us what you tell them.

A. Well, we—let's see—we tell them that we are the only manufacturers that remove the dirt from the chicle, and that is worked by means of sieves through a hair, you are hardly able to put a hair through, that the chicle is all squeezed through that and the dirt is left on the outside, and these combs come down and brush it off, 40

PLAINTIFF'S PROOFS.

all the dirt, and then we take them down into the hard candy department, and we show them the young men and young ladies all dressed in their white hats and their white coats and aprons, and we tell them that we do up in our own laundries anywhere from forty to fifty thousand pieces of laundry a week.

10 Q. For how many people?

A. That is between, well, approximately 750 people, and we do up 3,500 towels approximately every day, every working day, and that these changes must be made twice each week, Mondays and Thursdays, the clean aprons and overalls, the coats and pants, they must be changed twice each week.

20 And after looking that over we show them how the candy is poured, how clean the tables are, after each batch, the tables are cleaned after each batch, so when the next batch comes on there is no contamination whatever, and from then on through to the finish where the hard candies are sugared and wrapped.

30 And from there we go over into the peanut butter department, we stop at the top floor and we don't allow anyone going through to touch their hands on any of the products whatever, that is, dip in. For instance, we are going through the peanut department, some people might want to dip in and taste the peanuts; we don't allow that at all, and we tell them that to keep things in a sanitary condition we would rather not have them do that.

Q. What do these people see while being told, in connection with sanitary conditions, cleanliness?

Mr. Milton: How can this witness answer that question? It is objected to. He must place himself in their position.

The Court: Yes, reframe the question.

Mr. Bulkley: Question withdrawn.

40 Q. I interrupted you for the moment there.

JOHN M. HATTER—DIRECT.

Mr. Bulkley: Won't you read the last of the answer?

(Answer repeated by the stenographer.)

A. That was the finish of that.

Q. The conclusion of that?

A. Yes.

10

Q. What is done in and about the factory to maintain and bring about the cleanliness and sanitation?

A. Well, we have men there especially to clean up at all times of the day, and we have men there at night that do nothing but clean up. The machines are all cleaned up and thoroughly cleansed off after they are used. After they quit work at night the machines are all cleaned up, and not only the bacon machines but every one of the machines are thoroughly scoured with brushes, warm water.

20

Q. How about the macaroni department, do you take them through there?

A. Yes, sir.

Q. Well, what do you show them there, what do you tell them?

A. We show them the large mixer that mixes the dough and the water together, the flour rather, I should say, the flour and the water together, and slid down this board. There is another thing, this board is cleaned every time a batch comes down through it, the board is practically scoured, so that there will be no contamination on the board when the dough comes down into the big kneaders. After each part has come out of the kneaders, it is placed into a cylinder and from that cylinder there is a die underneath from which the macaroni is pressed out.

30

Mr. Milton: Now, Mr. Witness, are you describing what you know about this business, or are you telling us what you show and tell these people—which are you doing?

40

PLAINTIFF'S PROOFS.

Mr. Bulkley: Answer his question.

The Witness: That is what we explain to the people as we take them through.

Mr. Milton: All right, I have no objection to it.

10 A. (Continuing.) And from there we show them the young men that handle the macaroni, place it over the sticks for the drying purposes, after which they are taken down into the dry room and dried. Then from there we take them downstairs and show them how it is sawed up in lengths, uniform lengths, and the short ends are placed in a barrel and sold in bulk, and the uniform lengths are taken out, wrapped in paper, and placed in boxes for sale.

Q. Now, did I understand you to say that during the summer time you had at least six men who were constantly and unremittingly engaged in taking people through?

20 A. Yes, sir; and sometimes more.

Mr. Bulkley: That is all.

Mr. Milton: No questions.

WILLIAM H. MAICHLE, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Johnson.

Q. What is your name, please?

30 A. William H. Maichle, M-a-i-c-h-l-e.

Q. What is your age, please?

A. Forty years old.

Q. Residence?

A. East Orange, New Jersey.

Q. What is your occupation, Mr. Maichle?

A. I am division manager for the Beech-Nut Packing Company in what is known as the Greater New York division.

Q. What is your business address?

40 A. 29 Ninth avenue, New York City.

WILLIAM H. MAICHLE—DIRECT.

Q. How long have you been with the Beech-Nut Packing Company?

A. Since May, 1905.

Q. How many years is that?

A. Going on to nineteen years.

Q. What are your duties as District Manager for Greater New York?

10

A. Directing sales and the efforts of the retail and jobbing salesmen in the Greater New York territory.

Q. Do you go about among the trade yourself?

A. I do.

Q. What class of trade do you visit?

A. Wholesale, retail, both grocery and confectionery and tobacco, delicatessen stores, in fact, all wholesale and retail dealers handling food products or confectionery products.

Q. About how many dealers have you in the Greater New York district?

20

A. It is estimated that there are 18,000 retail grocers in the Greater New York district, and we aim to cover all of them, and there are several thousand retail confectionery, cigar and other stores that we aim to cover besides the wholesale grocery and wholesale confectionery and wholesale tobacco people.

Q. Do you visit a large percentage of those, of such dealers yourself?

30

A. I visit a great many, I am out a good portion of the time with the men, and also alone on the trade.

Q. To what extent do these various classes of dealers that you have mentioned handle both tobacco products, such as the Beech-Nut cigarettes and scrap tobacco, and the products put out by the Beech-Nut Packing Company?

Mr. Milton: You don't mean that this witness is expected now to testify to what percentage of 18,000 retail grocers, whom he may not possibly have visited—

40

PLAINTIFF'S PROOFS.

Q. To what extent, in your observations?

(Question repeated as follows:)

10 Q. To what extent, in your observation, do these various classes of dealers that you have mentioned handle both tobacco products, such as the Beech-Nut cigarettes and scrap tobacco, and the products put out by the Beech-Nut Packing Company?

A. I would say that a great majority of them, the retail grocers whom I have visited, and all of the—in fact, all of the cigar and tobacco dealers and news stands, wholesale grocers, and I believe that is all, news stands.

Q. How about the drug stores that you have mentioned?

A. Well, the drug stores also handle both lines, our confectionery products and tobacco products.

20 Q. I show you a package of Beech-Nut Scrap Tobacco which is an exhibit in this case. Have you ever seen packages of this tobacco before?

A. I have (indicating).

Q. Have you seen it for sale in your district?

A. I have, yes.

Q. For about how long?

A. I should say for three or four years.

30 Q. As you would go about among the trade, have you heard any inquiries, comments or remarks as to the Beech-Nut Scrap Tobacco and who makes it?

Mr. Milton: Will you answer that yes or no, Mr. Witness, so that I may object to what I assume is coming next.

A. Yes, sir; I have.

Q. Have you heard such inquiries, remarks and comments frequently?

A. Very frequently.

40 Q. And during what period of time?

WILLIAM H. MAICHLE—DIRECT.

A. For all the time I have known the tobacco, three or four years.

Q. And up to how recently?

A. Last week.

Q. What was the nature of such inquiries, comments and remarks?

Mr. Milton: Objected to, sir.

10

The Court: I sustain that objection.

The Witness: What is that?

The Court: I sustained that objection.

Mr. Milton: The Court means you can't answer that question.

Q. Can you give any particular instance of such inquiries, comments and remarks?

Mr. Milton: Same objection.

20

The Court: Answer that yes or no.

A. Yes.

Q. Will you please describe briefly such instances as you can remember where you can give the name and place and approximate date of such inquiries, comments and remarks?

Mr. Milton: Objected to on the ground it is obviously hearsay.

The Court: I sustain the objection.

30

Q. Will you please give the names of such parties who have made inquiries, comments and remarks upon this subject?

Mr. Milton: Objected to.

The Court: I will permit that, just the names.

A. Mr. Wyckoff of Pease & Elliman, Real Estate Corporation in New York City. Others?

Q. Any others?

40

PLAINTIFF'S PROOFS.

A. The buyer for R. C. Williams Wholesale Grocery Company in New York City; Mr. Meyer, the promoter for the International Tobacco Shows, that is all I can recall right now, sir.

Q. How recently have you heard such inquiries or comments from the parties you have named?

- 10 A. Mr. Meyer's comments were made last week. R. C. Williams & Company's comments were made, I should say, five or six weeks ago. Mr. Wyckoff's remarks were made six months ago.

Q. Have you seen the Beech-Nut cigarettes in your district?

A. I have.

Q. Have you heard such inquiries, remarks and comments about the Beech-Nut cigarettes and who makes them?

- 20 A. A great many of them.

Q. About how many could you say?

A. I should say hundreds.

Q. And how frequently?

A. At times more frequently than others, sometimes every day, and again once in a month or so, all depending on how often I get out in the trade with the salesmen.

Q. What do you tell these people who ask you these questions and make such remarks?

- 30 Mr. Milton: Objected to.

The Court: Sustain the objection.

Q. Have you received orders for either Beech-Nut scrap tobacco or Beech-Nut cigarettes?

A. I have.

Q. How have you received such orders?

A. Largely over the telephone—through the mail.

Q. And what do you tell parties who order Beech-Nut scrap tobacco and cigarettes from you?

- 40 Mr. Milton: That is objected to.

WILLIAM H. MAICHLE—DIRECT.

The Court: Well, that might be permitted in another form, what his answer has been where an order has come in through the mail. There is one way of proving that, I suppose. You received some orders through the mail; there have been some answers—

Mr. Johnson: Your Honor, we have an exhibit 10
book with something like forty or fifty such orders.

The Court: In the case now?

Mr. Johnson: One of the plaintiff's exhibits, admitted by stipulation.

The Court: Are they in the case now?

Mr. Johnson: Yes, your Honor.

The Court: What is the use of bothering about it?

Q. During the eighteen or nineteen years that you 20
have been with the Beech-Nut Packing Company, have you been selling products put out under labels such as you see on this board, marked Plaintiff's Exhibit No. 28?

A. I have.

Q. Right from the beginning of the time that you entered the employ of the Beech-Nut Packing Company?

A. I have, yes, sir.

Q. In the course of your duties, have you handled the price lists issued by the Beech-Nut Packing Company at frequent intervals? 30

A. I have; I have handled it continually.

Q. Are you familiar with those price lists?

A. I am very familiar.

Q. Have you in your possession a set of such price lists for some years back?

A. I have.

Q. For what period of years have you a set of such price lists?

A. I have a set of price lists dating from 1902, three 40
years previous to my employment.

PLAINTIFF'S PROOFS.

Q. And did you handle price lists during any of the period before you entered the Beech-Nut Packing Company?

A. I have; yes, sir, in the capacity of—

Q. Explain how that was.

10 A. In the capacity of grocery clerk in retail grocery store, where I had charge of the purchasing.

Q. At the request of plaintiff's counsel, have you prepared a summary of the Beech-Nut Packing Company products which you have taken from these price lists, putting it in the form of a list of the products put out for each year?

A. I have, yes, sir.

20 Q. Have you compared this summary that you have made up with the summary of products already in this case in the Patent Office record, and please state in what manner this summary of yours differs from the one already in the case?

A. The Patent Office list, I believe—shall I go on and answer that question?

Mr. Milton: I beg your pardon, Mr. Maichle, if you will wait just a second. Mr. Cavanagh says this is quite all right.

30 Mr. Johnson: This summary of products put out by the Beech-Nut Packing Company, identified by this witness is offered in evidence in this case as Plaintiff's Exhibit No. 35.

(Received in evidence and marked Exhibit P. 35.)

Q. As you have gone your rounds, Mr. Maichle, have you found it at any time necessary to explain that Beech-Nut scrap tobacco and Beech-Nut cigarettes are not made by the Beech-Nut Packing Company?

Mr. Milton: Objected to on two grounds. First because it is leading, and secondly, I think, it re-

LAWRENCE R. ATKINSON, JR.—DIRECT.

quires a hearsay answer—one that would not be binding upon us, rather—incompetent.

The Court: I will permit this. I don't think it makes much difference.

A. I have a great many times.

Q. And how recently?

A. Last week.

Q. That is all.

(No cross examination.)

LAWRENCE R. ATKINSON, JR., called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Johnson.

Q. What is your age, Mr. Atkinson?

A. Thirty-one.

Q. Residence?

A. Canajoharie, New York.

Q. What is your occupation?

A. I am plant inspector of the Beech-Nut Packing Company and also conduct special investigations occasionally.

Q. How long have you been with the Beech-Nut Packing Company?

A. Going on four years.

Q. What are your duties as plant inspector, Mr. Atkinson?

A. I inspect the plant for safety and fire hazards, and it is my duty to see that the plant is kept in a clean and sanitary condition.

Q. Do you have occasion to go about the plant in carrying out your duties?

A. Yes.

Q. How often?

A. Each day I cover all parts of the plant.

PLAINTIFF'S PROOFS.

Q. What do you observe, as you make your rounds in the plant?

A. I observe that—well, the plant is in an A-1 condition as far as cleanliness and sanitation is concerned. We try to keep it as safe and fireproof as possible.

10 Q. What result do you find in regard to the condition that you speak of, as you go through the plant? What result is reached?

A. Well, the result reached? I don't just understand your question.

Mr. Milton: You can lead him on it if you want, Mr. Johnson, I have no objection.

Q. What do you find the conditions to be in the plant?

20 Mr. Milton: He means from the standpoint of cleanliness and hygiene, doesn't he, and sanitation?

Mr. Johnson: That is it.

A. I find it to be in the best possible condition it can be.

Q. What is it your duty to carry out in those regards?

A. It is my duty to check up each department and see that the cleaners are cleaning thoroughly and not overlooking any corners or machinery.

Q. What degree of success do you have?

30 A. We have the utmost degree of success.

Q. What do you aim for?

A. Absolute cleanliness and sanitation.

Q. Can you give some detail which it has been your opportunity to observe in the extreme degree to which the Beech-Nut Company goes to ensure cleanliness?

A. Yes. For instance, every night there is a force of night cleaners, and they go to the pains of disassembling all machines that handle food products, so that they can thoroughly clean the inaccessible parts. These machines are assembled again when they are finished.

LAWRENCE R. ATKINSON, JR.—DIRECT.

Q. Is that done every night?

A. That is done nightly.

The Court: Is there a government inspection there?

The Witness: Not for cleanliness.

The Court: What for?

The Witness: Why, the Labor Board inspects for—well, they do for sanitary conditions, safety, and fire inspection.

The Court: You comply with all governmental requirements, I suppose?

The Witness: Yes.

Q. In your employment with the Beech-Nut Packing Company, have you had any occasion to make surveys of different parts of the country for the company?

A. Yes.

Q. Has that taken you through great portions of the United States?

A. It has, through the eastern part and southern.

Q. Have you visited the trade of those portions of the United States?

A. Yes.

Q. What kinds of stores have you visited?

A. Well, I have visited practically all kinds of wholesale and retail grocery, drug and tobacco, and then little cigar stands, that is, subway stands, places like that.

Q. Have you visited all classes of stores, such as you have listed in these various parts of the country?

A. Practically.

Q. To what extent have you found these stores keeping both tobacco products, such as the Beech-Nut cigarettes and scrap tobacco, and such products as are put out by the Beech-Nut Packing Company?

A. Well, I would say in the grocery stores that through the Middle West and South and many places through

PLAINTIFF'S PROOFS.

Pennsylvania, I would say most of the grocery stores, especially the neighborhood grocer, was carrying tobacco products, also drug stores.

Q. Have you found any large proportion of all kinds of stores that you have mentioned, carrying both products?

10 A. Yes, I would say eighty per cent.

Q. Have you ever been in Milwaukee, Mr. Atkinson?

A. Yes.

Q. Do you know a man named William Goldstein in Milwaukee?

A. Yes.

Q. What is the business of William Goldstein that you have met in Milwaukee?

A. He told me he was division manager for P. Lorillard & Company in Wisconsin.

20

Mr. Milton: I move to strike it out.

The Court: Do you know what his business was?

The Witness: I know what he told me.

The Court: I will let that stand.

Q. In whose employ was he, Mr. Atkinson?

A. P. Lorillard & Company's.

Q. Do you know what position he held with them?

A. He was division manager for Wisconsin.

30

Q. When was it that you met him?

A. It was in October of '21.

Q. The year 1921?

A. 1921, yes.

Q. Please state the circumstances of your acquaintance with Mr. Goldstein?

A. I went into the Loop Tobacco Store with the Beech-Nut division manager for Wisconsin, Mr. E. R. Lewis. This store was the store of Mr. Tuckwell, and in this store was Mr. Goldstein. Mr. Lewis introduced me to

40

LAWRENCE R. ATKINSON, JR.—DIRECT.

Mr. Goldstein, and as he did, Mr. Goldstein pulled a package of Beech-Nut cigarettes out of his pocket.

Mr. Milton: Now, just a minute, Mr. Witness. Surely, it is not going to be claimed in this case that the division manager of a company which maintains a force of salesman over practically the entire country has a right to bind this company by making statements.

The Court: Is that your purpose?

Mr. Johnson: No, your Honor, the purpose of bringing in these circumstances is in connection with the credibility of this witness, William Goldstein, who has already testified in this case for the defendant. He specifically denied certain statements, and we would like this witness to state the circumstances of his—

Mr. Milton: Has a foundation been laid for this?

The Court: I don't know, where are the statements?

Mr. Johnson: In the Lorillard record, page 463.

The Court: What particular part of his testimony are you referring to?

Mr. Johnson: On page 526, your Honor, cross question 343. "Have people ever asked you if the Beech-Nut tobacco and cigarettes were made by the Beech-Nut Packing Company? A. Never." "Did you ever make the statement that most people took Beech-Nut cigarettes to be a product of the gum people?" (345, that is.) "A. Absolutely not." "X-Q. 346. Did you ever make this statement that the Lorillard salesmen could offer cigarettes as the product of the Beech-Nut gum people, that there were no instructions against it? A. Absolutely not." And then all through this wit-

PLAINTIFF'S PROOFS.

ness' testimony, your Honor, he testifies to instructions that he gave his salesmen every morning before they went out on their routes.

10 Mr. Milton: If Mr. Johnson is through, in the first place, I don't think that is the kind of a foundation the law contemplates shall be laid for contradicting a witness, and in the second place, isn't this rebuttal testimony? Certainly, on the plaintiff's own case, this witness ought not to be called to say, if he can, that the witness Goldstein has not told the truth?

20 The Court: The question as it stands would be overruled anyway. You are asking this witness to relate a certain conversation. That is not the way to meet the situation which you desire to meet. I will sustain the objection to the question in its present form. What have you got to say about rebuttal?

Mr. Scott: It seems to be well taken, the objection, on the ground of rebuttal.

Q. That is all.

Mr. Milton: No cross examination.

(At this point an adjournment was taken to Wednesday, October 31, 1923, at ten-thirty A. M.)

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40

WILLIAM A. CHARLES—DIRECT.

Beech-Nut Packing Co.,

vs.

P. Lorillard Company.

Wednesday, October 31, 1923, 10:30 A. M.

(Case continued.)

Appearances as before.

WILLIAM A. CHARLES, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Charles?

A. Mount Vernon, New York.

Q. And what is the nature of your business?

A. I am a member of the corporation of Charles & Company, grocers, New York City.

Q. And what is the location, near the Grand Central Station?

A. Just opposite the Grand Central Station.

Q. And what is the general nature of that business?

A. General line of groceries and fruits, cigars and tobaccos.

Q. Specializing in any particular—

A. Not any more than just a general business in groceries.

Q. Wholesale as well as retail?

A. Yes, sir.

Q. And how long have you been in that business?

A. 75 years this month.

Mr. Milton: Not this witness, of course, Mr. Bulkley, for the record.

Mr. Bulkley: Apparently not.

PLAINTIFF'S PROOFS.

Q. Do you sell any tobacco in the form of cigarettes or cigars?

A. Yes, sir.

Q. How long have you been selling tobacco in that form?

A. I think as long as the firm has been in existence.

10 Q. And do you sell cigarettes and cigars under some general name?

A. Yes, sir.

Q. I show you a box of cigarettes with the name of your company upon it. Is this the cigarette which you sell?

A. Yes, sir.

Q. And how long have you been selling that cigarette under that name "Bon Voyage"?

A. Oh, for a matter of, I should say five or ten years.

20 Q. Does this cigarette bear upon it at any point any other name than that of Charles & Company?

A. No, sir; it does not.

Q. And in connection with cigars, I understand that you sell them under the name of Bon Voyage?

A. Yes, sir; we do.

Q. And that your name only appears in connection with the sale of those cigars?

A. Yes, sir; that is right.

30 Q. On the boxes or upon the cigars themselves?

A. Yes, sir.

Q. From your own knowledge can you say whether or not it is the general custom among grocers and other dealers to sell tobaccos and cigars and cigarettes under their own name without any connection with the name of the manufacturer?

A. It is a general custom.

Q. Do you make these cigarettes or cigars which you sell?

40 A. No, sir; we do not.

WILLIAM A. CHARLES—DIRECT.

Q. And who does make them for you?

A. They are made by the manufacturer whose factory number appears on the bottom of the box according to law, and that particular cigarette is made by the firm of Greeks, G. A. Georgopulo & Company. The cigars and tobaccos are made by other firms.

Q. Did you ever seen any cigarettes in a package bearing the name "Beech-Nut" upon the package? 10

A. Yes, sir; I have.

Q. Have you been selling these products of the Beech-Nut Packing Company?

A. Yes, sir.

Q. To what extent?

A. Very largely. I think we carry a large line of their goods. We sell a good many thousand dollars' worth of their products a year. 20

Q. And the varied products—

A. Yes, sir.

Q. Of that concern are sold by you?

A. Yes, sir. Possibly 25 or 30 different varieties of their products.

Q. What impression was made upon you when you saw this package of cigarettes, as you say you did, with the word "Beech-Nut" upon that package?

A. Well, the first time my attention was called it was either by a display in a window of the cigarettes or by a display on a billboard, I am uncertain of that. And just after seeing it, I mentioned the fact to a demonstrator of the Beech-Nut Company who was then demonstrating goods in our store, saying to her— 30

Mr. Milton: Objected to.

The Court: Now, not what you said. You are asked your impression and not what you said to somebody. 40

PLAINTIFF'S PROOFS.

A. Well, my impression was that the cigarettes were made by the Beech-Nut Company from having seen the word "Beech-Nut."

Q. How long did you remain under that impression?

A. Just for that day.

Q. What removed that impression from your mind?

10 A. My having been informed by this lady—

Mr. Milton: That is objected to.

The Court: Not what the lady said. Something that you heard from somebody.

The Witness: I heard something, yes, sir, from a certain party.

Q. To what effect?

Mr. Milton: Objected to.

20 A. That they were not made—

The Court: I will permit that.

A. That the cigarettes were not made by the company she represented.

Q. That as all.

Cross examination by Mr. Milton.

30 Q. Where was it you saw the sign to which you have referred?

A. Well, I think I said that I was uncertain whether it was a sign or a display in a window. I am under the impression that it was a billboard, but that I would not say positively.

Q. Do you now recall where it was that you saw it?

A. No, I do not.

Q. Do you recall when it was?

A. I should say it may be two years ago.

40 Q. Prior to that time you had not, I assume, purchased either from P. Lorillard Company or from any of its job-

WILLIAM L. MILLER—DIRECT.

bers any Beech-Nut cigarettes manufactured by that company?

A. Prior to that time?

Q. Yes.

A. I could not say that, we might have purchased them prior to my seeing the sign.

Q. You don't want us to understand that prior to your seeing this sign you had purchasd Beech-Nut cigarettes from the Lorillard Company, either directly from the company or from jobbers in the tobacco business, and that you afterwards saw this window display or billboard and seeing that, assumed that the Beech-Nut cigarette was the product of the Beech-Nut Packing Company? 10

A. Yes, sir, I assumed that they were the product of the Beech-Nut Packing Company, but I am uncertain whether Charles & Company had them in stock prior to the time that I saw the window display or the sign. We may have had them in stock but my attention may not have been called to it. 20

Q. So that it is unlikely, however, that prior to your seeing the sign, you had become acquainted with the fact that your company had the cigarettes in stock?

A. Personally I did not know that we had them in stock, although we might have. The first time my attention was called to the cigarette—

Q. Was the window display?

A. Was seeing this window display or the sign. 30

Q. Right. That is the first time you ever knew that there was such a cigarette?

A. Yes, sir.

Q. I think that is all.

WILLIAM L. MILLER, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Miller?

PLAINTIFF'S PROOFS.

A. 515 West 110th street, New York City.

Q. What is your business?

A. Publishing.

Q. How long have you been in the publishing business?

A. Thirty years.

10 Q. And being in the publishing business, do you have anything to do with the soliciting or obtaining of advertisements for your paper?

A. Yes, sir, that is my portion of the publishing business.

Q. Did you ever see any packages of cigarettes bearing upon that package the word "Beech-Nut"?

A. No, sir.

20 Q. How did you happen to learn of the use of the word "Beech-Nut," if you did, in connection with tobacco in the form of cigarettes or chewing tobacco?

A. Why, in connection with my duties as advertising manager, I saw the Beech-Nut cigarette advertised in the New York Evening Sun, and as it becomes necessary when you see new advertising, you immediately become busy and try to obtain the same for your publication.

Q. What was the general nature, if you remember, of this advertising of the Beech-Nut cigarette, which you saw?

30 Mr. Milton: Objected to.

The Court: Yes, that might be important.

Mr. Bulkley: That is simply preliminary to the question as to what the impression was which was made upon his mind with reference to the origin of the—

The Court: Well, we have got the origin in the newspaper. Now, if you are going to have him describe what was in the newspaper, you are getting on delicate ground because you might better have the copy that he saw.

40

WILLIAM L. MILLER—DIRECT.

Q. What was the impression in your mind from the advertising which you saw?

A. The impression made on my mind from the advertising was that the Beech-Nut Packing Company were responsible for the cigarette.

Q. I show you an advertisement. Is that the one to which you have just referred, as having been seen by you? 10

A. Yes, sir.

Q. What sort of an advertisement is that? A newspaper advertisement?

A. This is a newspaper advertisement.

Q. Do you remember the newspaper from which that was taken?

A. My impression now is it was the New York Evening Sun, because I know that they were carrying the advertising. 20

Mr. Bulkley: We offer that in evidence, your Honor.

(Received and marked Exhibit P. 36.)

Q. You say that you are in a general publishing business. Do you have some particular paper that has quite a widespread distribution?

A. Yes, sir.

Q. What is that paper?

A. The Spur Magazine. 30

Q. At the time that you saw this advertisement and obtained the impression that the cigarette as referred to in the advertisement were made by the Beech-Nut Company—how long did that impression remain with you?

A. Why, it remained with me several weeks, because the advertising was running almost continuously in this publication even prior to the time that I attempted to secure the business. 40

PLAINTIFF'S PROOFS.

Q. What attempt did you make to secure the business and what business was it that you sought to secure, and from whom?

A. Why, I wrote to the Beech-Nut Company and enclosed this advertisement and asked if it were possible for them to use the Spur.

10

Mr. Milton: Just a moment.

Mr. Bulkley: Very well.

Mr. Milton: I move to strike out beyond the statement that the witness wrote.

The Court: All right; it is consented to.

Q. Were you familiar with the general nature of the business of the Beech-Nut Packing Company at the time you saw this advertisement?

A. Yes, sir.

20

Q. Exhibit No. 36. And how long before that time had you been generally informed concerning the nature of the Beech-Nut Packing Company's business before you saw the advertisement?

A. I would say twenty-five years.

Q. What was the knowledge which you possessed as to the general character of that business, just tell us what that knowledge was.

30

A. I knew that their main establishment was at Canajoharie, New York, that they dealt in hams, and the Beech-Nut bacon and in jams, and various food products which had been liberally advertised all over the country.

Q. Did you see any gums and candies bearing the Beech-Nut label?

A. I knew they had the gum. I thought they included that in their other products.

By Mr. Bulkley: That is all, cross examine.

WILLIAM L. MILLER—CROSS.

Cross examination by Mr. Milton.

Q. Mr. Miller, when was it that you saw the publication referred to in the Evening Sun?

A. Why, I imagine about two years ago now, to the best of my recollection.

Q. And do you recall where you were when you saw this advertisement? 10

A. I was in my office.

Q. Were you reading the paper, just generally, or were you—

A. No, because I buy all the New York papers, both morning and evening, and they are always on file in our office.

Q. And for what purpose were you reading this copy of the Evening Sun?

A. Looking through for new advertising.

Q. You have heard, I assume, of P. Lorillard & Company? 20

A. Yes, sir.

Q. What is their business?

A. Tobacco business.

Q. Do you carry any advertisements for that company?

A. Yes, sir.

Q. Did you at the time you saw this advertisement of Beech-Nut cigarettes? 30

A. Just ask that over again.

Q. Did you carry advertisement business for Lorillard Company at the time you saw the advertising of Beech-Nut cigarettes?

A. Yes, sir.

Q. What has been produced here and offered as Exhibit P. 36, Mr. Miller, is a piece of paper clipped from some newspaper, showing the Beech-Nut cigarette, that is right, is it (indicating)?

A. Yes, sir. 40

PLAINTIFF'S PROOFS.

Q. And forming part of that advertisement is a representation of a package of cigarettes—correct?

A. Yes, sir.

Q. With what are two of the cigarettes projecting out of the top of the package; that is right?

A. Yes, sir.

10 Q. What else appears on the representation of the package of cigarettes?

A. "Beech-Nut perfect cigarettes."

Q. Is that all?

A. "P. Lorillard Company."

Q. Why the "P. Lorillard Company" come so hesitatingly?

A. Come what?

Q. Come so slowly?

A. I don't see where that—

20 Q. Did it or didn't it?

A. No.

Q. It didn't?

A. It is right in front of me.

Q. It is right in front of you?

A. Yes, sir.

Q. And you saw that without any difficulty?

A. Just now; yes, sir.

Q. Is that the first time you ever saw it?

30 A. No.

Q. You have seen "P. Lorillard & Company" printed in this advertisement before?

A. Well, I don't know; I presume I have, yes.

Q. When was the first time that you recall?

A. I couldn't give you a definite date on that, on the Beech-Nut advertising.

Q. Then I understand your testimony to be that you are unable to tell us now when you noticed for the first time either on a package of cigarettes or upon a piece of advertising showing a package of cigarettes as a part

WILLIAM L. MILLER—CROSS.

of the advertising, you are unable to tell us when you saw for the first time or noticed for the first time the name "P. Lorillard Co."

A. Well, I presume I saw it at the same time I cut that advertisement out of the paper.

Q. Did you cut this advertisement out of the paper?

A. Yes, sir.

Q. This is the advertisement you sent to the Beech-Nut Packing Company?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. What you want us to understand now is that you noticed that at the time you cut this piece of paper out of the newspaper, is that right?

A. Yes, sir.

Q. How long had you been in the advertising business prior to the time you cut this ad. out of the newspaper?

A. Thirty years.

Q. How long have you known P. Lorillard & Company?

A. Twenty years at least.

Q. And you had seen their products advertised in various publications, I assume?

A. Yes, sir.

Q. Do you know some of the products of P. Lorillard & Company other than Beech-Nut cigarettes?

A. Why, yes, they handle, or manufacture, chewing tobacco, smoking tobacco.

Q. Do you know the names of some of the brands?

A. Cigarettes.

Q. Do you know the names of some of the brands, Mr. Miller?

A. Well, not to recall immediately.

Q. So that knowing that P. Lorillard & Company were manufacturers of tobacco, smoking and chewing, and cigarettes, which fact you had known for twenty years,

PLAINTIFF'S PROOFS.

and having carried some of their business prior to the time you cut this clipping out of the paper, and seeing at the time you cut the clipping out—

A. Yes, sir.

10 Q. —the name “P. Lorillard & Company,” you want us to understand that you, nevertheless, wrote the Beech-Nut Packing Company assuming them to be responsible for the cigarettes?

A. I wrote to the Beech-Nut Packing Company, assuming that they were responsible for the advertising, under the surmise that the P. Lorillard Company might be making the cigarette for the Beech-Nut people.

Q. I see. So that there was no confusion in your mind at the time you wrote the Beech-Nut Company as to who the manufacturer of the cigarette was?

20 A. No, but the confusion in my mind was the name “Beech-Nut” being applied to a cigarette when the Beech-Nut Packing Company were manufacturing so many products under their own name.

Mr. Milton: If your Honor please, I move to strike out all the answer after the word “No.”

The Court: No, I will permit it to stand.

Q. At any rate, with respect to the origin, with respect to the manufacture of the cigarette itself, there was no confusion in your mind, Mr. Miller, is that right?

30 A. Well, that depends on what the word “manufacture” means. If you are manufacturing for another concern, putting out a product for them, I claim that my attitude was absolutely correct.

Q. I am not claiming that it was not. All I am trying to find out from you, and I don't think there is any dispute between us, all I am trying to find out from you is this, when you cut this clipping out of the newspaper, you knew that as a matter of common, ordinary everyday sense that cigarette was made, manufactured, put
40 together, if you please, by P. Lorillard Company?

WILLIAM L. MILLER—CROSS.

A. Yes, but that—

Q. I will go one step further—

A. The Beech-Nut Company was responsible.

Q. I will keep step with you. Let us get that fact established. Then you assumed that the Beech-Nut Packing Company was putting that cigarette out, first having it manufactured for it by Lorillard Company; that is right, isn't it? 10

A. That was my impression.

Q. And, accordingly, you wrote to the Beech-Nut Company?

A. Yes, sir.

Q. You had carried the business of the Beech-Nut Packing Company prior to the time you clipped Exhibit P.36 out of the newspaper?

A. Yes.

Q. And that business was consigned to the exploitation and advertising of food products? 20

A. Yes, sir.

Q. Can you furnish me with an illustration of the name of any other company manufacturing and selling over its own name food products, selling a tobacco product manufactured by another concern, with the name of the manufacturer appearing on the package?

A. No.

Q. You cannot?

A. Not at the moment.

Q. Well, then, take a moment or two to think about it. (After a pause): You are not able to recall any, Mr. Miller, are you? 30

A. Not at the moment; no, sir.

Q. I assume, Mr. Miller, that when you wrote the Beech-Nut Packing Company in reference to getting the business of advertising the Beech-Nut cigarettes, you had not previously communicated with P. Lorillard Company to find out whether it was marketing the cigarette it manufactured? 40

PLAINTIFF'S PROOFS.

A. No, sir.

Q. You acted immediately upon the assumption that it was a product which was being marketed by the Beech-Nut Packing Company?

A. Yes, sir, that was my impression.

10 Q. Now, having been so impressed by this piece of advertising, did that affect your opinion of the Beech-Nut Packing Company?

A. Why, no, I wouldn't say it did.

Q. And have you used or had you used, prior to cutting this piece of advertising out of the paper, Exhibit P. 36, any of the Beech-Nut products?

A. Had I tried them?

Q. Yes.

A. Oh, yes, many times.

20 Q. Bacon and ham and jams and jellies?

A. Yes, sir.

Q. And after having seen this piece of advertising, I assume that your opinion of the good quality of the products of the Beech-Nut Company was not affected thereby?

A. Not a particle.

30 Q. It would not make any difference to you, as a consumer of Beech-Nut Packing Company food products whether they manufactured a cigarette or sold a cigarette, would it?

A. Not in the least.

Q. You would still buy the Beech-Nut products?

A. I certainly would.

Mr. Milton: That is all.

Mr. Bulkley: If the Court will permit me, I will offer in evidence, package of cigarettes produced by Mr. Charles, the witness Charles.

(Received and marked Exhibit P. 37.)

NORMAN S. BERRY—DIRECT.

NORMAN S. BERRY, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Berry?

A. I live in Baltimore, 3509 Cottage avenue.

Q. What is your business?

A. My business is salesman for the Beech-Nut Packing Company. 10

Q. And what do you sell?

A. I sell the confection line.

Q. Did you, on some occasion, ask permission to dress the window of some grocer?

A. Yes, sir, I asked permission of a grocer, 651 South Light street, Baltimore, to dress a window.

Q. Did he grant your request?

A. Yes, sir.

Q. What did you do? 20

A. I immediately took Beech-Nut products down and dressed the window, exclusively with Beech-Nut products.

Q. What were those products which you took down and put in the window?

A. Chewing gum, peppermint, wintergreen, lemon and orange.

Q. About when was it you dressed the window in this manner?

A. August 26, 1922. 30

Q. Did you have occasion to observe that window at some later date?

A. Yes, sir, in working that territory about a week later, I passed and saw a Lorillard display in with my display.

Q. What was the nature of—

Mr. Milton: Pardon me, Mr. Bulkley, this having happened after the filing of the bill, I am wondering whether or not it is competent. This bill was filed in 1921. Is that right, Mr. Cavanagh? 40

PLAINTIFF'S PROOFS.

Mr. Cavanagh: That is right.

Mr. Milton: The incident to which this witness is testifying occurred in 1922, and I move that it be stricken out.

10 Mr. Bulkley: We have a right, it seems to me, to show a continuance of the state of mind of these ultimate consumers as a result of the acts of the defendant.

The Court: I will permit it.

Q. What was the nature of those products, or what was the change in the window which you observed when you saw it a second time?

20 A. I had a background of two large cards in the center of my window. When I passed the window about a week later, those two cards were taken out and this Lorillard background was in with my display.

Q. What did you do when you observed this change in the window?

A. I took a picture of it.

Q. Then did you develop that picture?

A. Yes, sir, I took it with my own camera.

Q. Do you recognize this photograph, which I show to you, as being the picture that you took?

A. Yes, sir, I took this picture.

30 Q. And do you now identify that picture as being an accurate illustration of what the change was which was made in that window?

A. That is an enlargement of this picture.

Q. Do you observe the name "Lorillard Company" anywhere in this picture?

A. Yes, sir.

Q. Where is that, at what point?

Mr. Milton: Objected to.

40 A. It is right on the bottom of that package.

NORMAN S. BERRY—DIRECT.

The Court: I sustain the objection to what he observes on the photograph. The photograph speaks for itself.

Q. Independently of this photograph, did you observe the name of Lorillard & Company at any point upon the poster which you say was substituted for yours?

A. Yes, sir, on the bottom of the package. 10

Q. That is on the bottom of the representation or picture of the package on the poster?

A. Yes, sir.

(The witness is shown large poster with two bathing girls and man.)

Q. Is this poster which I show you, the one which you saw in the window of this grocery, on the occasion of your second observation of that window?

A. No, sir, it is a little different from that although 20 it has the large package and the bathing girls.

Q. And had it the words, "P. Lorillard & Company"?

A. Yes, sir. It had the P. Lorillard Company.

Q. Upon the picture of the package?

A. Yes, sir.

The Court: This was in the window after you had dressed it?

The Witness: Yes, sir, after I had put my products in, and this was in with my products. 30

The Court: And this is what you objected to?

The Witness: Yes, sir.

Mr. Bulkley: Plaintiff offers in evidence the photograph, together with the enlargement of that photograph.

(Received and marked Exhibit P. 38.)

Mr. Bulkley: Plaintiff's counsel offers in evidence poster identified by the witness.

(Received and marked Exhibit P. 39.)

PLAINTIFF'S PROOFS.

Cross examination by Mr. Milton.

Q. Mr. Berry, why didn't the words, "P. Lorillard Co." come out on the photograph which you took?

10 A. I took that picture with a small number of a Brownie camera, and as those colors contrast, it did not show up, as red and black will not show up on a picture. That name would not show up on a picture unless you have a special camera.

Q. The fact is, that shown on the representation of the cigarette package forming part of the poster, the words "P. Lorillard Co." appear at the base or foot of the cigarette package, that is true?

A. Yes, sir.

Q. What other articles appeared in the window than those of the Beech-Nut Packing Company and this poster?

20 A. Three small circular cardboards, they each had a representation of a Beech-Nut cigarette package on it.

Q. Did the window contain the advertising of any other salable article?

A. No, sir.

Q. I see a card here advertising somebody's Georgia melons, do you recall that?

A. That might be on the window. I recall a Horn's ice cream poster on the window, if I am not mistaken.

Q. How large a window was this?

30 A. About five feet across, and about two or three deep.

Q. What is the advertisement appearing in the upper left-hand corner of the photograph below the Georgia melon card?

A. That is Horn's ice cream.

Q. And what is the advertisement appearing in back of the bathing girl on the right of the picture?

A. I cannot really make that out.

Q. Well, it is not a Beech-Nut Packing Company product, is it?

40 A. What, this here?

NORMAN S. BERRY—CROSS.

Q. Yes.

A. No, sir.

Q. Appearing in back of the head of the bathing girl on the right-hand side of the photograph, as you look at it. The sign that appears there is not one that advertises the Beech-Nut Packing Company products?

A. No, sir. 10

Q. Nor is it one that advertises the Beech-Nut cigarette?

A. No, sir.

Q. What was the can that appeared on the shelf at the upper right-hand corner of the picture?

A. It looks as though it is a cigar can to me.

Q. A cigar can?

A. Yes, sir; I don't know what kind.

Q. But at any rate, it is not a Beech-Nut Packing Company product? 20

A. No, sir.

Q. What was the card in the lower right-hand corner of the window, in the picture?

A. I believe that was an advertisement of a trip down the Bay.

Q. So that in this window in which you put your advertisement of Beech-Nut Packing Company products, there was an advertisement of Horn's ice cream, right? 30

A. Yes, sir.

Q. Of Horn's Georgia melons?

A. Yes, sir.

Q. Or melon seeds?

A. Yes, sir.

Q. A can showing cigars of some other manufacturer?

A. Yes, sir.

Q. A card advertising a trip down the Bay, or some other trip?

A. Yes, sir. 40

PLAINTIFF'S PROOFS.

Q. And a card in back of the bathing girls, one of the bathing girls, which you cannot now read, that is right?

A. Yes, sir.

Q. Advertising some product other than the Beech-Nut Company product?

A. Yes.

10 Q. And other than the Beech-Nut cigarettes, that is right?

A. Yes, sir.

Q. What other products or goods were advertised in that window that you recall, besides the ones I have read?

A. The Beech-Nut cigarettes.

Q. I mean other than the Beech-Nut cigarettes, other than the Beech-Nut Packing Company's goods, and the ones I called your special attention to.

A. None that I can remember.

20 Q. None that you can remember?

A. No, sir.

Q. Did he have more than one window in the store, or was this the only window?

A. No, sir; that was the only window.

Mr. Milton: I think that is all.

Mr. Bulkley: That is all.

30 JAMES F. MASTERSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Masterson?

A. Brooklyn, New York, 362 Branford street.

Q. What is your business?

A. I am in the publishing business.

Q. What do you do in connection with the publishing business?

A. I write financial news.

JAMES F. MASTERSON—DIRECT.

Q. For what paper or papers do you write financial news?

A. One paper, the National Financial News.

Q. How long have you been writing for that company?

A. About three years for the concern, although it was under a different name prior to May 7th of this year.

Q. Did you ever write an article about the Beech-Nut Packing Company? 10

A. Yes, sir.

Q. Do you remember when that was?

A. I don't remember the date, no, sir.

Q. Did you ever see any packages of cigarettes with the word "Beech-Nut" on the package?

A. Yes, sir.

Q. How long ago was that?

A. I first saw them a little over two years ago, I think. 20

Q. Under what circumstances did you see those packages?

A. Friend of mine asked me to have a cigarette on him, and they were Beech-Nut cigarettes.

Q. Did you smoke any of them?

A. Yes, sir.

Q. Did you ever buy any of these Beech-Nut cigarettes?

A. Yes, sir.

Q. And use them? 30

A. Yes, sir.

Q. What was the impression created in your mind by reason of the presence of those words "Beech-Nut" on these packages of cigarettes, one of which was given to you and the others which you purchased?

A. Why, I presumed they were made by the Beech-Nut Packing Company.

Q. How long did you remain under that impression?

A. I remained under that impression until, until after I had written the story, and it was brought to my atten. 40

PLAINTIFF'S PROOFS.

tion by a representative of the company, of the Beech-Nut Company.

Q. I hand you a copy of the National Financial News and ask you whether the article contained therein and headed "Beech-Nut Packing Company Earnings Nearly \$9 a Share" was written by you, and is that the article to which you have referred (handing paper to witness)?

A. Yes, sir.

Mr. Bulkley: Would your Honor like to look at that article to see the materiality? I shall offer it in evidence.

(Paper handed to Court.)

The Court: This is May 28, 1923?

The Witness: Yes, sir.

The Court: When did the Beech-Nut Packing Company register the label for tobacco purposes?

Mr. Scott: They never did.

Mr. Milton: They attempted to.

The Court: What is the date of that?

Mr. Milton: 1919.

Mr. Scott: In 1919 the application was made and the thing went on for a few months after that.

The Court: I see your point.

Mr. Bulkley: I offer in evidence the article identified by the witness, and the paper, the National Financial News, in which the article appears, to be marked Exhibit P. 40.

Q. Did you—

Mr. Milton: Just a minute.

The Court: Simply as showing the time of this man's impression?

Mr. Milton: Yes. I suppose if it is offered for that purpose I have no objection to it.

JAMES F. MASTERTON—CROSS.

The Court: Is there any other point?

Mr. Bulkley: Yes, we want to show the nature of the widespread publication to the world as a consequence of this article, which would have a tendency to create the same impression in the minds of a great many others.

The Court: That is a matter of argument.

Mr. Bulkley: Well, that tends to show that that argument is material, we can show it by the article itself.

The Court: There is a lot of immaterial matter in this article, a lot of things in this article that have no bearing.

Mr. Bulkley: Oh, yes, now I apprehend. It is confined only to the statement which has bearing on the confusion which might result in the mind of the reader of that article.

Mr. Milton: It is objected to, sir.

The Court: I will admit it.

(Paper received in evidence and marked Exhibit P. 40.)

Q. Was this paper, this particular issue of the paper, within your knowledge distributed in the ordinary course of business?

A. Yes, sir.

Mr. Bulkley: That is all.

Cross examination by Mr. Milton.

Q. Mr. Masterton, how long have you been connected with the "Financial News"?

A. With the magazine, the magazine has only been in existence since May 7th, but I worked for the—doing the same kind of work for the publisher of the paper for about three years.

PLAINTIFF'S PROOFS.

Q. So that this paper which you now produce, Exhibit P. 40, the National Financial News, is a weekly magazine, is it?

A. Yes, sir.

Q. Published where?

A. 120 Broadway, New York City.

10 Q. And this particular issue of May 28th was the fourth issue of the magazine, is that right?

A. Either the third or the fourth.

Q. It says No. 4, so that I guess it is the fourth?

A. Yes, sir.

Q. How is it sold, how was it sold in May, 1923?

A. How was it sold?

Q. Yes.

A. Why, through mailing lists and representatives in Chicago and Pittsburgh and Boston, and probably one or
20 two other cities.

Q. What was the circulation on May 28th?

A. That is something I can't say because I am not identified with that end of the publication.

Q. So far as you know it, approximately, what was the circulation?

A. I imagine—on that date there?

Q. Yes.

A. I imagine a little over a thousand.

Q. A little over a thousand?

30 A. Yes, sir.

Q. Is the paper still in existence?

A. Yes, sir.

Q. The occasion of your friend offering you a cigarette to smoke was the first time you had ever seen or heard of the Beech-Nut cigarettes?

A. Yes, sir.

Q. Had you heard of the Beech-Nut Packing Company prior to that?

A. Yes, sir.

40 Q. Are you married?

JAMES F. MASTERSON—CROSS.

A. Yes, sir.

Q. How old are you?

A. Twenty-four.

Q. How long had you been married prior to May, 1923?

A. A little under a year.

Q. Had you used any of the products of the Beech-Nut Packing Company? 10

A. My wife has.

Q. I assume your wife cooked them and you ate them?

A. Yes, sir.

Q. What products?

A. Bacon and peanut butter.

Q. Now, did you know that the bacon which was laid on the breakfast table in the morning and the peanut butter which came on at luncheon or at dinner at night, were made by the Beech-Nut Packing Company at Canajoharie, New York? 20

A. Did I know that?

Q. Yes.

A. Yes, sir.

Q. How did you find that out?

A. I read the labels and the name on the containers.

Q. Where did you see them?

A. In my wife's kitchen.

Q. In the kitchen at home?

A. Yes, sir. 30

Q. You observed, on the labels that the bacon—was it in a jar or can or what?

A. Both bacon and peanut butter were in a glass jar.

Q. Where was the label?

A. On the glass.

Q. What part of it, the bottom or the top?

A. No, I think about the middle.

Q. What did it say on the label besides what I have said to you "Beech-Nut Packing Company, Canajoharie, New York"?

PLAINTIFF'S PROOFS.

A. Why, I don't know that it said anything that I remember. Of course, there was a trademark. I don't remember any other printed matter on at all.

Q. Don't recall anything else but the fact that the bacon and apple butter or the peanut butter that you were looking at were made by the Beech-Nut Packing Company?

10 A. Yes, sir.

Q. And how did you find out that they made chewing or smoking tobacco?

A. Why, I took that for granted on the assumption that they made cigarettes. I believed that they made the cigarettes, and I therefore assumed that they made the smoking tobacco and chewing tobacco.

Q. So that your friend having offered you—by the way, when was it that your friend offered this cigarette?

A. That was a little over two years ago.

20 Q. Your friend having offered you casually a cigarette out of a Beech-Nut cigarette package, you assumed that the Beech-Nut Packing Company made that cigarette, and when you came to write this financial article for the Financial News you also assumed that the Beech-Nut Packing Company, being the manufacturer of a cigarette must be the manufacturer of a chewing tobacco and a smoking tobacco, that is right?

A. Yes, sir.

30 Q. What was on the package of cigarettes that your friend offered you a cigarette from?

A. The only thing I observed—on the package of cigarettes?

Q. Yes.

A. The only thing I observed was the name Beech-Nut.

Q. You didn't see P. Lorillard Co. on that, did you?

A. I didn't observe it, no.

40 Q. You weren't as keen about observing that, as you were about observing Mrs. Masterson's bacon and peanut butter in the kitchen?

JAMES F. MASTERSON—CROSS.

A. No, I was not.

Q. Where did you get the information with reference to the allied or subsidiary companies of the Beech-Nut Packing Company, which is contained in this financial article of yours?

A. From the cards of the Standard Statistics Company.

Q. Was it before or after you had purchased or obtained from your friend the Beech-Nut cigarette that you were married—after, I think, from my calculation of time?

A. Yes, sir.

Q. So that you had learned of the fact that there was a Beech-Nut cigarette being manufactured prior to the time you were married—right?

A. Yes, sir.

Q. Well, now, prior to your being married, what familiarity did you have with where bacon came from, whether it grew on trees or whether it was manufactured or whether it came off animals and who put it up?

A. The Beech-Nut bacon?

Q. Any bacon.

A. Why, that is a matter of general knowledge, isn't it?

Q. Well, I don't know whether it is or not. You want this Court to understand that you were then about 21 or 22 years old, is that right, when your friend offered you the cigarette?

A. Yes, sir.

Q. And you were an unmarried man?

A. Yes, sir.

Q. And when your friend offered you this cigarette out of a package with the word "Beech-Nut" on it, you knew of the Beech-Nut Packing Company being the manufacturer or producer or seller of bacon and other products, and assumed that it was the manufacturer of this cigarette, is that right?

A. Yes, sir.

PLAINTIFF'S PROOFS.

Q. You were then a young unmarried man of 21 or 22 years of age?

A. Yes, sir.

Q. Were you then using any of the Beech-Nut products at the time you got this cigarette?

A. Why, at home; that is, my mother was.

10 Q. Did you see them in your mother's kitchen, too?

A. Yes, sir.

Q. And after you were married, notwithstanding the fact that the Beech-Nut Company, as you knew it, or assumed it to be, was the manufacturer of a cigarette, you permitted your wife to buy Beech-Nut products, I assume?

A. Yes, sir.

20 Q. The fact that the Beech-Nut Company was making cigarettes and chewing tobacco and smoking tobacco, did not affect your judgment as to the desirability of buying its peanut butter or bacon or hams?

A. Not mine; no, sir.

Q. Peanut butter manufactured by the Beech-Nut Company was just as good whether they made or manufactured chewing tobacco or smoking tobacco or cigarettes?

A. Yes, sir.

Q. That is all.

30 G. FRANK DISBROW, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Disbrow?

A. South Amboy, New Jersey.

Q. And what is your business?

A. I am a laborer—a skilled laborer, for the terra cotta works.

Q. By what concern are you employed?

A. South Amboy Terra Cotta at present.

G. FRANK DISBROW—DIRECT.

Q. Did you ever see any package of chewing tobacco or cigarettes bearing upon it the name Beech-Nut?

A. Yes, I have bought quite some of it.

Q. H'm?

A. I have bought quite a little of it.

Q. Now, having reference to the chewing tobacco, did you buy quite a little of the chewing tobacco?

A. Oh, I hung fast to it two or three months.

Q. And then did you stop using it?

A. Yes, I did not care for it, I gave it up.

Q. And during the period of time extending over three months that you chewed a tobacco contained within a package bearing those words on it, what impression did you have as to who was the one putting out that chewing tobacco?

A. I was always under the impression that the Beech-Nut Packing Company made it.

Q. Well, why did you have that impression?

A. I am a confirmed user of Beech-Nut products at home, and I thought it was another product they were putting out, I was anxious to try it, I bought it, thinking it was a Beech-Nut product and expected the usual quality.

Q. Was it or was it not, in your opinion, the same quality?

A. In my own opinion it was not.

Q. Did you ever visit the plant of the Beech-Nut Packing Company in Canajoharie, New York?

A. Yes, about seven years ago. I think it was around 1916, either '15 or '16. I think it is '16, just previous to the war.

Q. Was that before or after you commenced to chew this tobacco, Beech-Nut tobacco?

A. That was before, possibly about three years before I started using Beech-Nut tobacco.

Q. Were you taken through the factory or plant of the Beech-Nut Company at Canajoharie?

PLAINTIFF'S PROOFS.

A. Yes, sir.

Q. By a guide?

A. Yes, sir.

Q. Did he explain to you the method of producing the products when he took you through?

10 A. We made a very thorough trip. I spent possibly a couple of hours there, the best part of two hours the day I was in, that is, we went from stem to stern of the building, through all the various departments.

Q. Now, did you purchase and smoke cigarettes on the package of which appeared the name Beech-Nut, after you had commenced to chew chewing tobacco?

A. No, I did not purchase any cigarettes until well, possibly, three or four months after I stopped using Beech-Nut tobacco.

20 Q. Well, with reference to those cigarettes, the package bearing upon it the name of the Beech-Nut cigarettes, what impression did you gain in the use of this package as to who made these cigarettes, or put those cigarettes out?

A. The same impression that I had formed in first buying the chewing tobacco.

Q. That is all.

Cross examination by Mr. Milton.

30 Q. How long have you lived in South Amboy, Mr. Disbrow?

A. About 32 years.

Q. How long have you been employed by the South Amboy Terra Cotta Company?

A. Just this year.

Q. What was your business prior to that?

A. Purchasing agent.

Q. For whom?

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G. FRANK DISBROW—CROSS.

A. Roessler & Hasslacher, chemical companies, that includes the Perth Amboy Chemical, the Niagara General Chemical, the General Bakelite.

Q. Where are they located?

A. They have factories in St. Albans, West Virginia, Niagara Falls, Perth Amboy. Those are the principal factories.

Q. When did you first begin to use Beech-Nut chewing tobacco?

A. Well, after the war about 1920, possibly it was in 1920, I would say within that year, I could not give a definite month, whether or not it was the early part of the year or the latter. I presume about the middle of '20.

Q. How long did you continue using it?

A. The chewing tobacco?

Q. Yes, sir.

A. Oh, I guess three or four months.

Q. Three or four months?

A. Yes, something like that.

Q. How frequently would you buy it?

A. Beech-Nut? A paper every day.

Q. When you smoked cigarettes, how frequently would you buy a pack of cigarettes?

A. Twice, sometimes three times a day.

Q. You mean that you smoked between two and three packs of cigarettes a day?

A. No, I will average about two, but I give about one away a day.

Q. The vice of treating is responsible for that?

A. I don't know, it seems to be a privilege of some people to ask for a cigarette.

Q. How long did you continue smoking the Beech-Nut cigarettes?

A. Oh, not as long as the tobacco, possibly a month or two.

Q. So that in three months you bought approximately ninety packages of chewing tobacco, and assuming that

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PLAINTIFF'S PROOFS.

you smoked the Beech-Nut cigarettes for a month, buying two a day, you bought approximately sixty packages of cigarettes—right?

A. About that, yes.

Q. Upon any of those ninety packages of chewing tobacco did you ever observe the word "Lorillard"?

10 A. I can't say that I did.

Q. Can you say that you did not?

A. I can't say that I did not.

Q. What can you say about it?

A. Simply bought the tobacco and put it in my pocket and don't think of looking at it. In the average case, you don't look at the tobacco after it is in your pocket, you reach around and tear the top off and then you reach in for a chew when you care for it.

20 Q. How many times a day do you suppose you took a chew?

A. You add to what you have.

Q. Approximately how many times a day would you reach into the pocket to get a piece of chewing tobacco, five?

A. More than that.

Q. More than that, ten?

A. A little less than that, I would say, well, between five and ten.

Q. Between five and ten?

30 A. Yes, sir.

Q. So that in effect you want the Court to understand your testimony to be this, that over a period of three months you have handled packages of Beech-Nut chewing tobacco at least five times, possibly ten times a day, and you have not observed the word "Lorillard" on any of those packages at any time?

A. Not at that time, no, not at the time I was using it, I did not.

Q. Not at the time you were using it?

40 A. No.

G. FRANK DISBROW—CROSS.

Q. When did you observe the word "Lorillard" on the package of chewing tobacco?

A. After smoking the Beech-Nut cigarettes—I also always shopped around for a cigarette just a little cheaper than I have been using. I have been smoking the same grade of cigarettes for approximately twenty-two years, the Murad, looking for a change, looking for quality, I bought a package of Beech-Nut, looking for a smoke, looking for something good, a little cheaper than what I had been paying for Murads, and I noticed one day a peculiar sort of an aroma or taste of formaldehyde, a peculiar taste. I tried another one or two and didn't find it so strong, I found that in the other cigarettes; and something, I don't know, by way of chance, I guess, I was mulling over the packages, and I saw the Lorillard, and then I said, "Oh, Beech-Nut doesn't make this stuff," and that was the first indication I had of the packer.

Q. Let's see. You saw "Lorillard" on that Beech-Nut package, is that right?

A. After using it for quite some time.

Q. After using it for quite some time. How long have you been a cigarette smoker?

A. Since I was about, I don't know, around along fourteen or fifteen.

Q. So that you have been using cigarettes, I think you said, about twenty-two years?

A. About twenty-two years.

Q. What other brands of cigarettes have you smoked besides Beech-Nut?

A. Ever since I started smoking cigarettes I have stuck pretty close to Murads, occasionally Sweet Caporals, I now and then try something else to find something better.

Q. Who makes the Murad cigarettes?

A. I don't know, I would have to guess. It was either Shinasi or Anargyros.

PLAINTIFF'S PROOFS.

Q. Who made the Sweet Caporal?

A. Formerly Kinney Brothers.

Q. Why do you say formerly Kinney Brothers?

10 A. I think it is an American product now. I was through one year the West Nineteenth street factory of Kinney Brothers, and inquired at a later time to go through again and they said it had been taken over by American Tobacco Company.

Q. Do you smoke any other cigarettes but the Murad, the Beech-Nut and the Sweet Caporal?

A. Yes, I have smoked a pack of something, trying for something else now and then.

Q. Mention them, if you can recall them.

A. You mean a package at a time?

20 Q. Mention what other kinds or brands of cigarettes you have smoked, if you can recollect, besides the Murad and the Sweet Caporal and the Beech-Nut.

A. Piedmonts, but very seldom—I can't recall many others. A cigarette to me is a Murad, that is all, nothing aside from that.

Q. How often, how long did you smoke the Piedmont cigarette?

30 A. I don't know, when I couldn't buy possibly a Murad in some small place I would buy a Piedmont to hold me over.

Q. You never noticed, of course, who made the Piedmont, did you?

A. No, sir.

Q. How long did you smoke Sweet Caporal?

A. Just fill-ins, in between.

40 Q. Will you explain to the Court and to me if Sweet Caporal was just a fill-in, how you know or knew that Kinney Brothers made Sweet Caporal cigarettes and you didn't know that Lorillard made Beech-Nut cigarettes until your attention was attracted by the presence of some odor, formaldehyde, I think you said?

G. FRANK DISBROW—CROSS.

A. When I was a kid, I can only remember one cigarette being sold for the penny, we used to get two Sweet Caps for a cent. When we reached the label, we used to mark off as kids to the label in cutting the cigarette in two. I parted the cigarette with my fingers about where Kinney Brothers, Sweep Cap, about the middle of that cigarette.

Q. Have you used Sweet Caporals recently, in recent years?

A. Yes, but I wouldn't know if there was any change in that cigarette.

Q. Where is the factory of the Beech-Nut Packing Company?

A. I only know of one, that is at Canajoharie. I was visiting there one year and I was invited to go through it.

Q. Did you ever look at the back of the package of Beech-Nut tobacco?

A. No, sir; I never observed any mark on it.

Q. You never observed that was manufactured at a factory at Ohio, did you?

A. No, sir.

Q. So that not only did you fail to observe that the word "Lorillard" was on this package of Beech-Nut chewing tobacco which you had in your hand sometimes at least five times a day, and possibly ten times a day for a period of three months, but you likewise failed to observe that on the back of the package is a statement that the tobacco is made under a special process in Middletown, Ohio?

A. I never noticed any marks on it. I have handled thousands and thousands, you might say, in 22 years, packages of Murads, and can't tell you anything about it except the Murad is made by Shinasi Brothers.

Q. Or Anargyros?

A. Or Anargyros, yes. I want the cigarette, not the package, when I buy it.

PLAINTIFF'S PROOFS.

Q. So that the name of the manufacturer does not make any difference?

A. It does not appeal to me, although I like to buy a man's goods that puts quality up.

10 O. Right, and when you happen to strike a tobacco of a particular blend that pleases your taste, you don't care whether it is made by Tom Jones or Richard Brown?

A. I don't care who makes it if it is good and appeals to me.

O. That is why you smoked Murad cigarettes for twenty years?

A. Yes, sir.

Q. The same as I did. So that, after all, what you are interested in in tobacco is something that pleases your taste, isn't it?

A. That appeals to me, yes.

20

Mr. Milton: That is all.

FRANK ARNOLD, Jr., called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Johnson.

Q. What is your age, Mr. Arnold?

A. Thirty years old.

Q. Your residence?

30 A. 143 St. Ann's avenue, Bronx, New York City.

Q. What is your occupation?

A. Accountant.

Q. Employed by whom?

A. H. K. McCann Company.

Q. What is their business?

A. Advertising.

Q. Located where?

A. 61 Broadway, New York City.

Q. How long have you been with them?

40

A. Ten years.

FRANK ARNOLD, JR.—DIRECT.

Q. What are your duties there?

A. Assistant head of the revenue accounting department.

Q. Revenue accounting department?

A. Revenue accounting department.

Q. Do you write advertising copy at all?

A. No, sir.

10

Q. I show you a package of Beech-Nut scrap tobacco, an exhibit in this case (indicating). Did you ever see a package of that before?

A. No, sir.

Q. You never saw Beech-Nut scrap?

A. No, sir.

Q. I show you a package of Beech-Nut cigarettes, which is already an exhibit in this case (indicating). Did you ever see a package of those before?

A. Yes, sir.

20

Q. About when?

A. About two years ago.

Q. When you first saw a package of these Beech-Nut cigarettes, whom did you think put them out?

A. I was under the impression they were made by Beech-Nut Packing Company.

Q. What made you think that?

A. In connection with the name.

Q. The name you saw on the package?

A. Yes, sir; the name of the brand.

30

Q. Did you buy a package of Beech-Nut cigarettes?

A. Yes, sir.

Q. And under that belief that they were made by the Beech-Nut Packing Company?

A. Yes, sir.

Q. Did you smoke the cigarettes?

A. Not all of them, I did smoke some of them.

Q. What did you do with the rest of them?

A. Gave them away to my friends.

40

PLAINTIFF'S PROOFS.

Q. Why did you not smoke the rest of them?

Mr. Milton: No man ever smokes a full package of cigarettes, his friends usually do.

Q. Did you ever buy another package of Beech-Nut cigarettes?

10 A. No, sir.

Q. Why not?

A. I didn't like the taste.

Q. When did you find out that they were not made by Beech-Nut Packing Company, and how?

A. Only in conversation with other friends of mine, I learned that they were not manufactured by the Beech-Nut Packing Company.

Q. Was that some time later?

A. Yes, sir.

20

Cross examination by Mr. Milton.

Q. When was it you bought your first package of Beech-Nut cigarettes, Mr. Arnold?

A. About two years ago, when they were displayed on United Cigar Stores counters.

Q. You saw them displayed on the United Cigar Stores counters?

A. Yes, sir.

30 Q. And had you been a cigarette smoker before that time?

A. Yes, sir.

Q. What had you smoked, I mean usually?

A. Camel cigarettes.

Q. Camel. Did you know who made the Camel cigarette?

A. No, sir.

Q. As a matter, of fact, you didn't care, did you?

A. No, sir.

Q. The Camel cigarette had pleased your taste?

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FRANK ARNOLD, JR.—CROSS.

A. Yes, sir.

Q. Like Mr. Disbrow, the last witness, tobacco is tobacco—if it happens to hit your taste, it is what you like, is it?

A. Yes, sir.

Q. You don't care whether it is made by Beech-Nut or by Lorillard Company or by any one else, do you? 10

A. No, sir.

Q. If the blend suits your fancy, that is what you buy, isn't it?

A. Yes.

Mr. Milton: I think that is all.

Mr. Bulkley: Now, if your Honor please, we cannot impose upon your indulgence any further than we have already done. We do have two witnesses who have promised to be here at two o'clock or about half-past two and I would make this suggestion, if it meets with the approval of the other side, that with that exception, we will close our case, and hope to be able to put these witnesses on the stand as they relate to the same general subject. 20

The Court: The same sort of testimony?

Mr. Bulkley: Yes, the same character of testimony, as constitutes the testimony taken by deposition and which has been taken here. 20

The Court: Is the other side prepared to go on with witnesses?

Mr. Milton: No, sir, it comes somewhat as a surprise although Mr. Johnson did tell me this morning when we started to examine here, that in all probability they would finish about noon. But it comes somewhat as a surprise in view of the statement made in the opening yesterday that there were some ten witnesses to be examined. In our conferences—I have not participated with them, 40

DEFENDANT'S PROOFS.

but Mr. Preston and Mr. Cavanagh have with Mr. Bulkley, Mr. Scott and Mr. Johnson—they rather assumed that they would take all of today, and perhaps some time tomorrow, so we are not prepared to go on now. We will be prepared to go on, I think, perhaps at two o'clock, if we can get started.

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The Court: How many witnesses have you, eight or ten?

Mr. Milton. We had planned when we made the statement yesterday that we would call some ten witnesses—we had planned to take some testimony along the lines of the testimony this morning, but we have reconsidered that and have come to the conclusion in as much as the subject matter has been so fully covered in the depositions we will rest with that, and not take any oral testimony in court—on that point, of course.

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The Court: You may finish all of the testimony today?

Mr. Milton: We will hardly finish today. We will surely finish tomorrow. We might finish today, but I doubt it.

The Court: Do you think your witnesses will be here before two o'clock?

30

Mr. Scott: They have not come yet, your Honor, I don't believe it will be till three.

The Court: You have no right to take such liberties. Yesterday you wasted considerable time. You should have your witnesses ready to proceed. If they are not here until three, there is a waste of three hours which may interfere with the Court's plans for the week.

Mr. Bulkley: We don't want to do that, and we will rest our case.

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STIPULATION.

The Court: No, I won't require that. Do you think you will have some witnesses before two?

Mr. Milton: Our witnesses are here, but I am frank to confess that I have not enjoyed the benefit of a talk with them, and I would like to discuss some few little matters with them before putting them on the stand.

10

The Court. Suppose we take a recess until half-past one, and will you proceed with some of your witnesses then?

Mr. Milton: I think so.

The Court: And then when your witnesses arrive we will suspend and allow you to finish your case.

RECESS.

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AFTERNOON SESSION.

Mr. Cavanagh: If your Honor please, in opening defendant's proof before this Court, I think it would simplify matters if I read into the record at this time certain formal stipulations which were made, and if they are incorporated in the record, which it is intended to be printed, I think it will be greatly for the convenience of Court and counsel, and therefore, if the Court has no objection, I would like to have permission to read them. I will now read a stipulation relative to eleven exhibit books, which have been prepared by the defendant as his exhibits. These books are here. The stipulation reads as follows:

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DEFENDANT'S PROOFS.

IN THE DISTRICT COURT OF THE
UNITED STATES.

DISTRICT OF NEW JERSEY.

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Beech-Nut Packing Company
vs.
P. Lorillard Company.

} Equity No.
3056.

Stipulation.

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It is stipulated by and between the parties, through their respective counsel, (subject to the condition hereinbelow stated in regard to Defendant's Exhibit Book No. VII) that the labels, wrappers, posters, and other advertising matter contained in the following named books were actually used in trade in the United States, and are genuine specimens of the labels, wrappers, posters and other advertising matter so used.

Books entitled:

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- "Defendant's Exhibit Book No. I," containing fifty-three sheets,
- "Defendant's Exhibit Book No. II," containing thirty-three sheets,
- "Defendant's Exhibit Book No. III," containing twenty-four sheets,
- "Defendant's Exhibit Book No. IV," containing thirty-five sheets,
- "Defendant's Exhibit Book No. V," containing forty-two sheets,
- "Defendant's Exhibit Book No. VI," containing twenty sheets,
- "Defendant's Exhibit Book No. VII," containing thirty-one sheets,

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STIPULATION.

"Defendant's Exhibit Book No. VIII," containing fifty-five sheets,

"Defendant's Exhibit Book No. IX," containing twenty-seven sheets,

"Defendant's Exhibit Book No. X," containing twenty-five sheets, and

"Defendant's Exhibit Book No. XI," containing fifty-three sheets.

It is further stipulated that all of the labels contained in Defendant's Exhibit Books Nos. I-VI, inclusive, were obtained by defendant since the institution of this suit and were, when obtained, and, so far as known, still are, in actual use upon goods bought and sold as merchandise in the open market; that the products upon which said labels are used are actually being manufactured or put out by the company whose name appears thereon as maker or producer, where such name does appear.

Provided that defendant insert in Book No. VII inscriptions showing the date of first use of each piece of advertising contained therein, the quantity and period of time during which each of said pieces of advertising contained in said book was used, it is stipulated that the advertising matter contained in said Book No. VII has been actually used by defendant in the conduct of its business.

It is further stipulated that all of the labels and wrappers in Defendant's Exhibit Nos. VIII and IX were obtained by defendant since the institution of this suit and that they were, when obtained, and, so far as known, still are, actually in use upon goods bought and sold as merchandise in the open market; with the exception that the labels of the Bollinger-Babbage Co., Inc., Louisville, Ky., for "St. Elmo Brand Peanut Butter," that appears

DEFENDANT'S PROOFS.

10 on pages 2, 13, 23 and 55 of Defendant's Exhibit Book No. VIII have been voluntarily discontinued by the said Bollinger-Babbage Co., Inc., upon protest of the plaintiff herein; that the cigarette, scrap chewing tobacco and chewing gum wrappers contained in Defendant's Exhibit Book No. X were obtained by defendant since the institution of this suit and were then, and, are now, actually in use upon the market, except where otherwise noted, and that where representations to the contrary appear attached to the wrapper, those representations are true, and, that the wrappers, posters and other advertising matter shown in Defendant's Exhibit Book No. XI, were all obtained by defendant since the institution of this suit, and were when obtained, and so far as known still are actually in use upon the open market.

20 Plaintiff reserves the right to object to all, any, or any part of any one of the foregoing Exhibit Books on the ground of incompetency, irrelevancy, and immateriality.

OFFIELD, BULKLEY, POOLE & SCOTT,
Attorneys for Plaintiff.

RICHARD B. CAVANAGH,
Counsel and Attorney for Defendant.

30 October 15, 1923.

Mr. Cavanagh: Now, if your Honor please, in connection with that stipulation—

Mr. Bulkley: Have you another—are you about to read another stipulation?

Mr. Cavanagh: Not at the present time.

Mr. Bulkley: I want to enter an objection under the stipulation.

STIPULATION.

Mr. Cavanagh: Yes, but I want to give the Court some idea of what is in those books. I want to say, if your Honor please, that we have five books here which contain labels showing marks which are used upon tobacco products and also the same names or marks as used upon other products. We have five of those, and for illustration you have before you here Omar cigarettes, a tobacco product, and a stock of Omar food products. You have Camel cigarettes, the famous cigarette of the Reynolds Company and Camel food products. You also have Mogul cigarettes, one of defendant's products, and you have Mogul food products. Now, these books contain a great many labels along that line; in fact, the first five books do, the tobacco books and other labels in other industries bearing the same name. 10

Mr. Bulkley: May I ask, as anticipatory of the objection, what you are seeking to prove by these books? 20

Mr. Cavanagh: I am simply trying, Mr. Bulkley, to explain to the Court so he won't be in a maze, so he can have some idea of what my books contain. You can put in any objection afterwards.

Now, Exhibit Book No. 6 contains no tobacco labels but contains labels with the same name or mark used by different companies but not inclusive of tobacco. 30

Exhibit Book No. 7, for the information of the Court, is a book devoted exclusively to the Lorillard advertising.

Exhibit Book No. 8 contains labels showing various kinds of ovals and bands and the like commonly used in business.

Exhibit Book No. 9 is devoted to a collection of labels showing the use of the color red as a background for these various labels. Exhibit Book No. 40

DEFENDANT'S PROOFS.

10 contains labels of cigarettes, scrap tobacco and chewing gum.

Exhibit Book No. 11 contains a collection of labels showing the use of the word "quality" or these labels which bear the word "quality" in some manner or form.

10 I state that to the Court simply to inform the Court as to what these books contain, so that the Court can put its finger on them when desired. If the Court wishes any further explanation—

The Court: No, no; that is sufficient.

Mr. Bulkley: Plaintiff objects to the admission in evidence of Books Nos. 1 to 6 on the ground of immateriality.

20 The Court: Well, I will overrule the objection at this time.

Mr. Bulkley: You reserve your decision on that?

The Court: I will overrule it at this time. You may renew it at such time as you may think it advisable.

Mr. Bulkley: Very well, sir.

Mr. Cavanagh: I have another stipulation here, if your Honor please, which reads as follows—which relates to the Pure Food Internal Revenue Law:

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STIPULATION.

"UNITED STATES DISTRICT COURT.

"DISTRICT OF NEW JERSEY.

"Beech-Nut Packing Company,
Plaintiff,

vs.

P. Lorillard Company,
Defendant.

In Equity
No. 3056.

*Stipulation.**Re: Pure Food and Internal Revenue Law, etc.*

"It is hereby stipulated by and between counsel for the above-entitled cause, as follows:

"(1) That chewing gum is subject to the provisions of the Food & Drugs Act of the United States, while tobacco used for smoking or chewing, or snuff, and not for medicinal purposes, is not subject to this Act; but that tobacco is subject to the provisions of the Internal Revenue Laws of the United States, while gum is not subject to such Internal Revenue Laws.

"(2) It is further stipulated that the printed pamphlet entitled 'Correspondence—Beech-Nut Packing Company and P. Lorillard Company—in re: "Beech-Nut trademark,"' embodies true, complete and exact copies of the original correspondence, and that the printed copy of the correspondence may be used in this cause with the same force and effect as duly proven and acknowledged originals, the execution or genuineness of the originals being admitted by both parties."

Mr. Bulkley: Have you offered that in evidence as yet, Mr. Cavanagh?

DEFENDANT'S PROOFS.

Mr. Cavanagh: No, I will in a second. (Continuing:)

“(3) It is further stipulated that regular uncertified Patent Office copies of trademark registrations, and other governmental publications may be introduced in evidence with the same force and effect as if duly certified, subject of course to correction for error.

“OFFIELD, BULKLEY, POOLE & SCOTT,
Counsel for Plaintiff.

“RICHARD B. CAVANAGH,
Counsel for Defendant.

“Dated:
New York City,
October 29th, 1923.”

Mr. Cavanagh: Now, in that connection, your Honor, I would like to offer in evidence this correspondence between the parties.

(Received in evidence and marked Exhibit D. 18.)

Mr. Cavanagh: Now, I would like to explain to the Court that in connection with some of these books which bear the tobacco trademark names and the trademark names of the food product companies, plaintiff at one time was unwilling to stipulate that the food companies had no connection with the tobacco companies or vice versa, so we entered into this stipulation after affidavits were made.

STIPULATION.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,

vs.

P. Lorillard Company,
Defendant.

In Equity
No. 3056.

10

Stipulation.

It is hereby stipulated by and between the parties, through counsel, that if Richard J. Boylan, Elwin Clark Brenn and George T. Minnigerode were called as witnesses on behalf of the defendant, that they would testify as per their annexed affidavits, all executed October 29th, 1923, and that these affidavits may be incorporated in the record as the testimony of the said parties, defendant reserving all rights to object to this testimony as immaterial and irrelevant.

20

OFFFIELD, BULKLEY, POOLE & SCOTT,
Counsel for Plaintiff,

RICHARD B. CAVANAGH,
Counsel for Defendant.

30

Dated:
October 29th, 1923.

Mr. Cavanagh: Now, I will first read Mr. Boylan's affidavit as testimony.

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DEFENDANT'S PROOFS.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,

vs.

P. Lorillard Company,
Defendant.

In Equity
 No. 3056.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } ss.

RICHARD J. BOYLAN, being first duly sworn, deposes and says as follows:

My name is Richard J. Boylan; I am of lawful age; I am now, and have been for many years past Assistant Secretary of The American Tobacco Company, located at 111 Fifth Avenue, New York, and am well acquainted with the tobacco trade marks or brands of this concern; that The American Tobacco Company is the owner of the tobacco trade marks or brands Omar; Blue Ribbon; Gilt Edge; Sweet Maple; Picadilly; Excelsior; Badger; Lucky Strike; Liberty; Five Bros.; Ivanhoe and Sovereign, and that the American Tobacco Company has no connection with any concern making or marketing food products, confections or chewing gum under brands or trade marks of similar name or names.

RICHARD J. BOYLAN.

AFFIDAVIT OF RICHARD J. BOYLAN.

Sworn to and subscribed before me, a Notary Public, this 29 day of October, 1923.

(SEAL) J. R. CUMMINGS,
Notary Public.

New York County No. 260

New York Register No. 4056

My commission expires March 30, 1924.

Mr. Bulkley: Plaintiff objects on the ground of immateriality.

The Court: Objection overruled.

Mr. Bulkley: Subject to renewal later?

The Court: Well, I will hear you any time you want to make an objection.

Mr. Bulkley: That involves the same question that is connected with the admissibility of books 1 to 6.

The Court: At this time I will overrule your objection.

Mr. Cavanagh: I will now read the affidavit of Elwin Clark Brenn.

DEFENDANT'S PROOFS.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,

vs.

P. Lorillard Company,
Defendant.

In Equity
 No. 3056.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } *ss.*

ELWIN CLARK BRENN, being first duly sworn, deposes and says as follows:

My name is Elwin Clark Brenn; I am of lawful age; I am Assistant Secretary of Liggett & Myers Tobacco Company, located at 212 Fifth Avenue, New York City, and have held such position for many years past and am well acquainted with the trade marks or brands of this company; that Liggett & Myers Tobacco Company is the owner of the tobacco brands or trade marks Star; Rex; Velvet; Sunshine; Piedmont; Polo; Chesterfield; Harmony and Perfection, and that Liggett & Myers Tobacco Company has no connection with any concern making or marketing food products, confections or chewing gum under brands or trade marks of similar name or names.

EDWIN CLARK BRENN.

Sworn to and subscribed before me, a Notary Public, this 29th day of October, 1923.

T. C. ALLEN.

(SEAL)

Notary Public, Westchester Co.
 Certificate filed New York County No. 110.
 New York Register's No. 4102.

AFFIDAVIT OF GEORGE T. MINNIGERODE.

Mr. Bulkley: Same objection.

The Court: Objection overruled.

Mr. Cavanagh: I will now read the affidavit of George T. Minnigerode.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,

vs.

P. Lorillard Company,
Defendant.

In Equity
No. 3056.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

GEORGE T. MINNIGERODE, being first duly sworn, deposes and says as follows:

My name is George T. Minnigerode; I am of lawful age; I am Assistant Secretary of the P. Lorillard Company, the defendant herein, and have been for many years past, and am familiar with its tobacco brands or trade marks; that P. Lorillard Company is the owner of the tobacco brands or trade marks Mogul; Veribest; Climax; Red Cross; Jack Rose; Comet; Eureka; Honest; Yacht Club; Murad; Leroy; Banner; I-X-L and Peerless, and that the P. Lorillard Company has no connection with any concern making or marketing food products, confections or chewing gum under brands or trade marks of similar name or names.

GEORGE T. MINNIGERODE.

DEFENDANT'S PROOFS.

Sworn to and subscribed before me, a Notary Public, this 29th day of October, 1923.

(SEAL) H. S. IVIE.
Notary Public.
New York Co. No. 91.
New York Register No. 5002.

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Mr. Cavanagh: Now, if your Honor please, under that stipulation and your ruling, I would like to offer in evidence these exhibit books.

The Court: I have already admitted them, haven't I?

Mr. Meyer: The stipulation has been admitted, I don't think the books have been offered.

The Court: All right, the books may be marked.

20

Mr. Bulkley: In order to preserve the objection on the record, I object to the admissibility on the ground of immateriality.

The Court: Objection overruled.

The Exhibit Books I to XI are received in evidence and marked as follows:

Defendant's Exhibit D. 19 (Exhibit Book No. I).

Defendant's Exhibit D. 20 (Exhibit Book No. II).

30

Defendant's Exhibit D. 21 (Exhibit Book No. III).

Defendant's Exhibit D. 22 (Exhibit Book No. IV).

Defendant's Exhibit D. 23 (Exhibit Book No. V).

Defendant's Exhibit D. 24 (Exhibit Book No. VI).

Defendant's Exhibit D. 25 (Exhibit Book No. VII).

40

JAMES T. NEWTON—DIRECT.

Defendant's Exhibit D. 26 (Exhibit Book No. VIII).

Defendant's Exhibit D. 27 (Exhibit Book No. IX).

Defendant's Exhibit D. 28 (Exhibit Book No. X).

Defendant's Exhibit D. 29 (Exhibit Book No. XI).

JAMES T. NEWTON, called and sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Meyer.

Q. What is your name, age, residence and occupation?

A. James T. Newton, patent and trademark attorney and solicitor of foreign patents and trademarks.

Q. With whom are you now associated in business?

A. I am now associated with the firm of Marks & Clerk, of London, Washington, New York and Chicago.

Q. What is the business of Marks & Clerk?

A. They are solicitors of patents, trademarks, foreign and domestic.

Q. Prior to your association with Marks & Clerk, what was your business?

A. For seven or eight years I was Examiner of Trademarks in the Patent Office, and I was afterwards made Assistant Commissioner and then Commissioner of Patents, and had as my duties mostly the passing on trademarks, questions that had been appealed from the Examiner of trademarks before the Commissioner, under the statute.

Q. How long were you in the Patent Office, all told?

A. Twenty-eight years, about.

Q. While in the Patent Office you became intimately associated and familiar with the trademark practice, as I understand?

DEFENDANT'S PROOFS.

A. Yes, I had charge of the trademark division, regulated it, prescribed rules and regulations, under the statute.

Q. And for what part of the time were you in charge of the trademark division of the Patent Office?

A. About seven or eight years.

10 Q. Has the trademark division of the Patent Office a pamphlet giving a classification of these trademarks?

A. It has.

Q. Have you such a pamphlet?

A. I have.

Q. Where in that pamphlet do you find the classification?

A. On the last page of the pamphlet, page No. 46.

Q. What is the heading?

20 A. "Classification of Merchandise under the Act of May 4, 1906."

Q. How many classes are there in that list?

A. Fifty classes, numbered here from 1 to 50.

Q. And those various classes pertain to various manufactured commodities, as I understand?

A. Yes.

Q. Under what class do you find food products? Has it a number?

30 A. The food products are numbered in this list of classes No. 46, foods and ingredients of foods. All trademarks that are registered for foods and ingredients of foods are supposed to be in that Class 46.

Q. Do you find also in that list a class for tobacco, and if so, what is the number of that class?

A. That class is numbered 17, "Tobacco products," and in that class are supposed to be all the registrations for tobacco products, such as cigars, tobacco and cigarettes.

40 Q. Please look at this list of commodities that the Beech-Nut Packing Company was putting out in 1915 as appearing on the list of Complainant's Exhibit 35, and state in what class the commodities are.

JAMES T. NEWTON—DIRECT.

A. The list you handed me of the products of the Beech-Nut Company for 1915, bulk goods such as hams and bacon, sliced bacon, sliced beef, peanut butter, tomato sauce, prepared mustard, Jaffee, cider vinegar, beans, olive oil, chewing gum, mints, conserves, jams, jellies, marmalades, and fruits, and syrups, seem to me to be all classified under the Class 46, "Foods and Ingredients of Foods." 10

Q. Have you made an examination to ascertain instances in which the same trademark owned by different people has been registered in two registrations respectively for tobacco and food products, and if so, produce a few instances of such?

A. Yes, I have, at your suggestion, made that examination and I find there are a great many trademarks that have been registered in quite a number of classes; some trademarks seem to be more popular than others, for instance, the mark "Climax." I find that has been registered 68 times, that is, 68 different owners of the word "Climax" have registered that in the office in various classes. P. Lorillard have registered it in the class of chewing and smoking tobacco. The Climax Coffee and Baking Product Company have registered it for coffee. 20

Q. In what class is that?

A. That is in Class 46; that is in the foods and ingredients of foods. 30

Q. You find Eureka has been registered in about 60 cases?

A. In about 68 or 70 classes, different classes.

Q. And in various classes?

A. Nearly all the classes of the office, I think that word has been registered. It is quite a popular trademark and is registered for various things.

Q. Did you procure copies of those registrations, and have you them here?

A. I have. I can furnish those copies of registrations. 40

DEFENDANT'S PROOFS.

Q. In how many volumes are they?

A. There are three volumes.

Q. Will you tell me which of the registrations are in Volume I, just by name?

10 A. In Volume I are the marks "Climax," which has been registered about 68 times; the "Between the Acts" was registered several times, four or five times; "Red Cross" was registered, oh, a great many times, probably 75 or 80 times, for various kinds of goods. It has been registered in nearly every class in the Patent Office. I suppose every class in the Patent Office has some trademark, some Red Cross trademark registered in it. "Honest" has been registered several times and "Eureka" is another popular trademark that has been registered probably 75 or 80 times.

20 Q. What about Volume II?

A. Volume II is another list in which some of the popular trademarks and some of the trademarks that are used by the various tobacco companies show the number of registrations granted for each one of those names. For instance, "Camel" has been registered a great many times; the word "Omar" has been registered in several classes; "Omega" has been registered in many classes. The word "Rainbow" has been registered something like 75 times, I should say, for various classes of goods. 30 These classes, of courses, are made by the Patent Office in its attempt to follow the decisions of the courts, and these classes contain what the courts would ordinarily hold to belong to the same class of goods, similar class of goods or, as they express it, goods of the same descriptive character.

Mr. Bulkley: We object, if your Honor please, to the expression of opinion on the part of this witness as to what the courts would or would not hold, as immaterial.

JAMES T. NEWTON—DIRECT.

The Court: Well, strike out the latter part of the answer.

Q. And Volume III contains what trademark brands?

A. Volume III is another collection of registered trademarks that have been registered in various classes. The word "Navy," "Army and Navy," the word "Polo," the word "Blue Ribbon," have been registered a great number of times; so has the word "Clipper," "Horse Shoe," "King Pin," "Liberty Bond," "Liberty Bell" and the word "Liberty" itself have been registered probably 75 times in the various classes.

Q. And, as I understand you, those volumes contain trademark words which have been registered in the class of tobacco, for tobacco products, and there are also examples of instances, numerous examples of instances where the same mark has been registered for other products, like food products?

A. Yes. Most of these marks I have read have been registered in the tobacco class and in the food products class, food and ingredients of food.

Q. By different concerns?

A. By different proprietors, by different owners.

Q. So far as you know, and from your experience in the Patent Office, when an applicant, when a trademark applicant files an application, does the examiner extend his investigation outside of the class which this application belongs to, or does he confine it to that class?

A. He, I might say almost invariably, confines it to a class that the owner of a trademark says the goods belong to. For example, if an application for registration of a trademark in tobacco products were filed in the Patent Office, a search through the class of tobacco products would be made. There would be no search made outside of that class, I don't think, in any other class, except in the class of tobacco products.

DEFENDANT'S PROOFS.

Q. So far as this classification of the United States Patent Office is concerned, to which you have referred, do you know whether there is any similar classification in other countries?

A. Yes.

Mr. Bulkley: Objected to as immaterial.

10

Mr. Meyer: I simply want to show it is the practice of practically all of the countries to have a trademark classification of this kind.

The Court: I will permit it. The answer is yes.

The Witness: Did you—

The Court: I heard you say yes, is that right?

The Witness: Yes.

20

Mr. Meyer: I would like to offer in evidence the list to which the witness has referred as Exhibit D. 30—and also bound Volumes 1, 2 and 3 of the trademark registrations as Exhibits D. 31, D. 32, and D. 33, and also the Patent Office pamphlet of trademark classifications, D. 34. That is all.

30

Mr. Bulkley: Your Honor, we are prepared to admit all that the witness has testified to with respect to registration of different foods and different classes. We, however, do object to the admission in evidence of these large lists that have been prepared here, on the ground of immateriality.

The Court: Objection overruled. Any cross examination, Mr. Bulkley?

Mr. Bulkley: No, sir.

40

Mr. Cavanagh: If your Honor please, in the continuation of defendant's case at this time, there have been a great many depositions taken, and I would like to read just about three comparatively short ones to give this Court an idea of the rest of these depositions. If I have that permission I will be glad to read them.

HOWARD C. BAILEY—DIRECT.

The Court: Very well.

Mr. Cavanagh: The first deposition we will read is that of Samuel Rackmales, a witness called on behalf of the defendant, at Baltimore, Maryland. Direct examination by Mr. Cavanagh, Volume I of defendant's record, page 326.

(Deposition read by Mr. Cavanagh.)

Mr. Cavanagh: I will now read the deposition of J. S. Weiner, taken on behalf of the defendant. It appears in Volume II of defendant's record, page 795.

(Deposition read by Mr. Cavanagh.)

Mr. Cavanagh: I just have one more deposition, the deposition of Barnett Dickstein, presented on behalf of P. Lorillard & Company which appears in Volume II, page 1194 of defendant's record.

(Deposition read by Mr. Cavanagh.)

Mr. Cavanagh: I think that is sufficient, your Honor, to give you an illustration or an idea of the character of some of the testimony.

Mr. Bulkley: Mr. Bailey, will you take the witness stand?

HOWARD C. BAILEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Bailey?

A. Port Washington, Long Island.

Q. What is your business?

A. Advertising manager of the International Motor Company.

Q. Did you ever see any packages of cigarettes with the word "Beech-Nut" on those cigarettes?

A. I saw these Beech-Nut cigarettes on the counter in one of the Shulte stores some months ago; I don't know

PLAINTIFF'S PROOFS.

exactly, and I didn't buy any, but I simply took it for granted they were Beech-Nut products.

Mr. Milton: Just a minute, Mr. Witness, not so fast. I move to strike out all of the answer after he said he had seen them on the cigar counter.

The Court: Strike out.

10

Q. Were you familiar with the products made by the Beech-Nut Packing Company at the time or prior to your having seen these Beech-Nut cigarettes?

A. Yes, sir; I am familiar with the household products.

Q. To what extent are you familiar?

A. To the extent that we buy quite a few of them, my wife buys them.

Q. Sir?

20

A. My wife buys them frequently, serves them on the table.

Q. What was the impression made upon you by reason of having seen these Beech-Nut cigarettes, with these words, "Beech-Nut," upon the package?

A. I naturally took it for granted that they were produced by the Beech-Nut Company.

Q. How long a time did you remain under that impression?

A. Until about two days ago.

30

Q. How did you learn you were not correct in that impression?

A. I was talking to Mr. Anderson of the McKann Agency, and he happened to mention that there was a difference on that subject, and we talked it over.

Mr. Bulkley: That is all.

HOWARD C. BAILEY—CROSS.

Cross examination by Mr. Milton.

Q. Mr. Bailey, when you saw these Beech-Nut cigarettes on the counter in the Shulte store, you didn't buy any, I assume?

A. No, sir.

Q. You just happened to see one or more packages on the counter?

A. On display.

Q. And that was, you think, during 1923?

A. Why; yes, yes.

Q. During this year. Are you still using in your home the food products of the Beech-Nut Packing Company?

A. Yes, sir.

Q. So that the assumption, however erroneous it might have been on your part, that the Beech-Nut Packing Company was the manufacturer of a cigarette, had no influence upon you in the purchase of these food products after that?

A. No.

Q. You were still willing to buy all of the food products which you could use of that company, notwithstanding the fact that it had gone into the tobacco business, so far as you assumed?

A. Quite right.

Q. When you saw this display, did you take any of the packages of the cigarettes into your hands, or just see them lying on the counter?

A. Saw them on the stand and took it for granted.

Q. That was while you were in buying some article of tobacco or something else?

A. Buying tobacco.

Q. Are you a cigarette smoker?

A. Yes, sir; part of the time.

Mr. Milton: I think that is all.

Mr. Bulkley: That is all.

DEFENDANT'S PROOFS.

We have a witness coming at three, but rather than delay the proceedings or annoy the Court any further, we will close.

The Court: If the other side can fill in—in the meantime, it won't annoy me any.

10 Mr. Milton: As I said this morning to your Honor, when the counsel on both sides were in conference early this week, I think on Monday of this week, it was stated by the other side that they expected to take all of Tuesday and all of today. This sudden termination of the plaintiff's case has left us in the position where I don't think we can go on this afternoon beyond the point which we have gone. We will be prepared to start early in the morning and finish tomorrow, assuming that the cross examination is no longer than the examination in chief, and we will finish well by four
20 o'clock, or before that.

The Court: And you will use Friday for argument of the case?

Mr. Milton: I think there was some agreement between counsel that the testimony should be written out.

The Court: First.

30 Mr. Milton: First, and that a sixty-day period should intervene for the preparation of briefs, if this course is satisfactory to your Honor, of course.

The Court: That would give the Court plenty of time to forget all about the case.

Mr. Scott: The understanding, your Honor, was—I think the defendant requested that the argument be put off to a later date, and we responded that we would accede to that, to the extent of asking the Court, joining them in a request, ask the Court for time to file briefs, and if the Court
40 wanted some more argument after that we would

WILLIAM R. PERKINS—DIRECT.

argue, but we put that entirely as to whether the Court wanted the argument—

The Court: You mean oral argument?

Mr. Scott: Yes.

The Court: The Court wants oral argument at some time or other.

Mr. Scott: Whether the Court wanted it later or at the close of the trial—we said if the Court wanted one later, it would be perfectly agreeable, and that is all we said. We didn't try to arrange the matter, so I think that is simply a matter for the Court to state its wishes on, whether we shall argue it now or later, or whether the Court wishes to hear some arguments now or some after the briefs. It seems to me it is simply a matter for the Court to express its wishes on.

The Court: Well, we will discuss that tomorrow. A witness will be here at three?

Mr. Bulkley: That is what we were told.

The Court: All right, I will wait until three.

Mr. Milton: We can perhaps take another witness and utilize as much of the time this afternoon as is possible.

The Court: All right.

WILLIAM R. PERKINS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Milton.

Q. You live where, Mr. Perkins?

A. Montclair, New Jersey.

Q. What is your business or profession?

A. I am a lawyer.

Q. Associated or connected with whom?

DEFENDANT'S PROOFS.

A. I am counsel for the P. Lorillard Company.

Q. And have been counsel for the P. Lorillard Company for how long?

A. Well, off and on since December, 1911. The last time I came with them was in the spring of 1917, I think, 1918.

10 Q. You have been continuously with the Lorillard Company since the spring of 1917?

A. Yes.

Q. And prior to the spring of 1917 you have been counsel for the company off and on?

A. From December, 1911, until about December, 1913.

Q. Prior to December, 1911, were you associated or connected with any of the companies, the tobacco companies?

A. With the American Tobacco Company.

20 Q. When was the present P. Lorillard Company formed?

A. In the latter part of November, 1911.

Q. How long prior to December, 1911, had you been associated with the American Tobacco Company?

A. Since October, 1906.

Q. And in what capacity?

A. In the legal department, as one of the counsel.

30 Q. I show you a paper, Mr. Perkins, which is headed, "P. Lorillard Company," and under that "cigarettes," consisting of a number of sheets, 16 sheets, upon which appear the names of various cigarettes, little cigars, plug tobaccos, long cut tobaccos, plug cut tobaccos, granulated tobaccos, clippings and scrap tobaccos, and then various names under the caption of Luhrmann & Wilbern, fine cut tobaccos, packed cheroots and cigars, Federal Cigar Company brands, little cigars, another sheet headed "Federal Cigar Company, Active cigar brands, Federal Cigar Company," ditto, another sheet the same, the same on another sheet, the same on another, and the same on the last,

40

WILLIAM R. PERKINS—DIRECT.

and ask you what you know about the preparation of that paper?

A. In or about the year 1908, the Government of the United States began a suit in equity under the Sherman Anti-Trust Law against the American Tobacco Company and its subsidiary and affiliated companies, charging that they were a combination and monopoly within the terms of that Act, and after some years in which the litigation proceeded, the Supreme Court of the United States in May, 1911, rendered an opinion holding the American Tobacco Company and these affiliated and subsidiary companies a combination and a monopoly in restraint of trade under that Act, and sent the case back to the Circuit Court of the Second District of New York to work out and enter a decree which should restore lawful conditions in the opinion of that Court. Such a decree was worked out and was entered in November, 1911, by the Federal Circuit Court of the Second District of New York, and this paper was prepared, and at the time that decree was entered, shortly after, in the carrying out of that decree, was given to the P. Lorillard Company stating the brands which under the decree it became entitled to get.

Q. Let me interrupt you right there. Have you a copy of the decree here? Is it this pamphlet (indicating)?

A. Yes. The whole proceeding is reported in 191 Federal Reporter, but there are printed pamphlets of the decree made at that time.

Q. I want you to refer us to the particular paragraphs of the decree which provide for what you have just said. Is that the decree (indicating)?

A. Yes, this is a printed copy of the decree.

Q. Oh, is it, all right.

A. That was made at that time, yes.

Mr. Bulkley: It seems to us, your Honor, that the witness should not express his opinion as to the

DEFENDANT'S PROOFS.

findings under that decree, but let the decree speak for itself.

The Court: He is going to point out a paragraph.

10 Mr. Milton: I am not going to ask this witness to construe the decree. I am going to ask him to point out that paragraph which he—

Mr. Bulkley: Then I move that the latter part of his answer which consists of a conclusion as to what the findings in the decree were, shall be stricken.

The Court: I forget just now what he did say.

(The last answer of the witness repeated by stenographer as follows:)

20 “The whole proceeding is reported in 191 Federal Reporter, but there are printed pamphlets of the decree made at that time.”

Mr. Bulkley: Just preceding that.

(The answer was repeated by the stenographer as follows:)

30 “Such decree was worked out and was entered in November, 1911, by the Federal Circuit Court of the Second District of New York, and this paper was prepared and at the time the decree was entered, shortly after, in the carrying out of that decree, was given to the P. Lorillard Company, stating the brands which under the decree it became entitled to get.”

Mr. Bulkley: That is the conclusion to which we object.

The Court: Strike out the latter part of that.

Mr. Milton: “The brands to which under the decree it became entitled.”

The Court: Yes, just that part.

WILLIAM R. PERKINS—DIRECT.

A. On page 17 of this pamphlet is provision F of the decree and that is the provision that provides for what we called at the time the division of the direct business of the American Tobacco Company. If I may explain that, the American Tobacco Company controlled a good many companies through stock ownership, and the decree required it to distribute the stock in various of those companies. 10

Mr. Bulkley: Now I move to strike that.

The Court: I will let that stand. It is a reference to facts. I will let it stand.

Mr. Bulkley: But I think not within the knowledge of the witness.

The Court: I beg your pardon?

Mr. Bulkley: Perhaps not facts within the knowledge of the witness. 20

The Court: You may ascertain the source of his knowledge.

A. (Continuing.) That portion of the decree is Section E of it, which says: "The American Tobacco Company will distribute among its common stockholders by way of dividends, and to be charged to its surplus, all of its securities of the following described classes, whether now owned by it or bought by it from American Cigar Company, as hereinbefore set forth, or bought by it from P. Lorillard Company, as just hereinbefore set forth, or received by it by way of dividends from any of the accessory companies defendant, as hereinbefore set forth, to wit.: 30

"American Snuff Company—"

And then follows a list of those companies.

Q. Do you find the Luhrmann & Wilbern Company in that list?

A. Not in that list. Then comes provision F, which provides—I will read from the decree—"There will be 40

DEFENDANT'S PROOFS.

organized a new corporation called Liggett & Myers Tobacco Company, and a new corporation called P. Lorillard Company, and The American Tobacco Company will sell, assign and convey to these two companies factories, plants, brands and businesses, and capital stocks of tobacco manufacturing corporations, as shown in Exhibit 'A' hereto attached."

10

And Exhibit A reads: "To P. Lorillard Company: All the rights of The American Tobacco Company in the present P. Lorillard Company, to wit: all the common stock and \$1,596,100 at par out of a total issue of \$2,000,000 of eight per cent. preferred stock; it is contemplated that as a part of these reorganizations the Lorillard Company, as at present constituted, be wound up and the new company be organized, taking over assets of the P. Lorillard Company;

20

S. Anargyros, a company engaged in the manufacture of cigarettes, in which The American Tobacco Company owns all the stock, and of which it has always owned all the stock;

Luhrmann & Wilbern Tobacco Company, a company engaged in the manufacture of scrap tobacco (a kind of smoking tobacco), of which The American Tobacco Company owns, and has for many years owned, all the stock;

30

Philadelphia Branch B at Philadelphia, Wilmington Branch B at Wilmington, Penn Street Branch at Brooklyn, Danville Branch B at Danville, and Ellis Branch B at Baltimore, branches of The American Tobacco Company manufacturing little cigars, the principal brand being 'Between the Acts';

Federal Cigar Company, a company all of whose stock is, and has always been, owned by American Cigar Company, but which, as hereinbefore provided, is to be purchased for cash by The American Tobacco Company."

40

Q. Now, what connection was there between those provisions of the decree and the schedule which you have

WILLIAM R. PERKINS—DIRECT.

read and the paper which I have shown you consisting of a number of sheets that I specified?

A. That was the paper which was gotten up and delivered to the Lorillard Company, the new Lorillard Company, which this decree which I have read, required to be formed, as showing the brands that it got under this decree, in the division of the assets, under this decree, of the American Tobacco Company. 10

Q. And do you know in whose possession this paper has been ever since that time in 1911?

A. Why, it was in the possession of the officers of the Lorillard Company.

Q. I refer you to the fifth sheet, and ask you to read the names of the brands listed under the caption Luhrmann & Wilbern?

A. "Bag Pipe," "Beech-Nut," "Honest Scrap," "Natural Leaf," "Old Nut," "Polar Bear," "Scrap Iron." 20

Q. What had you to do with the preparation of the lists, Mr. Perkins?

A. I represented the American Tobacco Company's legal department in the preparation of them.

Q. Did you actively take part in the getting up of the lists of the brands that were divided among the different companies?

A. Oh, sure. I talked with the officers of the companies and we together prepared that list, at the same time, we prepared, of course, lists to be gotten by the American, and lists to go to Liggett & Myers. 30

Mr. Milton: We offer this, if the Court please.
(Received and marked Exhibit D. 35.)

Q. I now show you, Mr. Perkins, paper purporting to be assignment of business, and so forth, American Tobacco Company, to P. Lorillard Company, dated December 1, 1911, and ask you if you have ever seen that before? 40

DEFENDANT'S PROOFS.

A. I drew that.

Q. You drew it. And did you know the signature of Mr. Percival Hill? Is that it?

A. Yes, that is the signature of Mr. Percival Hill, also Mr. Willcox, the secretary. There is my pencil memorandum "O. K." made at the time.

10 Q. Made on or about the 1st day of December, 1911?

A. On or about that date.

Q. You recognize your initials?

A. Oh, yes, those are my initials.

Q. In connection with what transaction was this paper prepared?

A. The distribution of the assets of the American to the Lorillard, pursuant to the provision of the decree I have just read.

20 Mr. Milton: We offer that and ask that it be marked.

A. (Continuing.) You will see that that is the language of the decree.

(Received and marked Exhibit D. 36.)

30 Mr. Milton: I am going to call the Court's attention to it in a minute. The emphasis that we desire to lay upon this, and I will call the Court's attention to the pertinent part in the assignment, is: "All the rights of the American Tobacco Company in the old P. Lorillard Company, to wit: all the common stock and \$1,596,100 at par out of a total issue of \$2,000,000 of eight per cent. preferred stock." Following the language of the decree. "All the stock of S. Anargyros, a corporation existing under the laws of the State of New York, engaged in the manufacture of cigarettes;

40 "All the stock of Luhrmann & Wilbern Tobacco Company, a corporation of the State of New Jersey, engaged in the manufacture of scrap tobacco;

WILLIAM R. PERKINS—CROSS.

"All the stock of Federal Cigar Company, a New Jersey corporation, engaged in the manufacture of cigars;

"Philadelphia Branch B at Philadelphia; Wilmington Branch B at Wilmington; Penn Street Branch at Brooklyn; Danville Branch B at Danville, Virginia; and Ellis Branch B at Baltimore; 10
all branches of The American Tobacco Company, engaged in the manufacture of little cigars, the principal brand being 'Between the Acts.'

"Each of the foregoing properties is conveyed as a going concern."

That language is preceded by the general assignment clause which sets over to the vendee, the Lorillard Company and its successors and assigns, the factories, plants, brands and businesses and capital stocks of tobacco manufacturing corporations 20
as follows: which I have read, your Honor.

Cross examination by Mr. Scott.

Q. In compiling this list, Mr. Perkins, which was referred to by you containing a dozen or so sheets, do you remember where you got the information to compile the lists of different brands?

A. From the records of the American Tobacco Company. 30

Q. What was your procedure? Simply to go to the records of these old companies and copy out lists of brands they had used?

A. We took the brands of the various companies, just as their records showed.

Q. Simply went to the records of those companies, found out all the brand names that appeared on their books and copied them into here?

A. We took the brands they thought they had a right to convey. 40

DEFENDANT'S PROOFS.

Q. That they had a right to convey?

A. Yes.

Q. But you simply went to the records of these companies—I want the practical procedure—didn't you, and took off from those records the names of all the brands that appeared there?

10 A. I went to the officials of these companies, and in conjunction with them and their records, we made out what we regarded that these companies were entitled to of the various brands under that decree according to the best information we could get.

Q. Did you omit any that appeared on the books of those companies?

A. Not that I recollect.

Q. You made a sweeping and complete list?

20 A. I couldn't tell you about that, Mr. Scott. We made what we thought they ought to have under all the circumstances.

Q. So this merely represents what you individually thought they ought to have?

A. No, what the officers thought, too. It isn't my individual thought.

Q. And you say that you don't remember omitting anything, simply made a complete list of all the brands you could find on the records of these companies?

30 A. I cannot say that, Mr. Scott. I say that this is what we made and delivered and what the officers and myself concluded then they were entitled to. I cannot tell you whether we took all on the list or not. I cannot just remember that, I cannot remember that.

Q. You don't remember then, the origin from which you got these names?

A. I got it from the records in the office.

Q. What are those records?

A. Books and papers of those companies.

40 Q. What kind of books?

WILLIAM R. PERKINS—CROSS.

A. Various books they had, their conveyances, their brand books.

Q. What is a brand book?

A. Their various records that they had.

Q. Did each of those companies keep a separate book called a brand book and have a list of its brands in it?

A. I think the American had something like that, if I recall. I don't recall that the others did. 10

Q. What form was this record in as possessed by the other companies?

A. Why, they had their price lists and they had the conveyances to them, when they acquired them, and all those things. We went by all of them.

Q. So this list, as a practical proposition, is a summary copied off, of the names that you found on the brand books and upon the price lists and brands named in conveyances that you found in the files of these old companies? 20

A. Yes.

Q. That is what this is?

A. It is the brands we ascertained, and the officers said and we agreed at that time, should be included. Now, whether it was all of the brands or whether they omitted some I cannot tell you, because that is what we decided ought to be put over to these various companies.

Q. Do you remember at this date omitting any brand whose name you found on those old records? 30

A. No, I don't recall any.

Q. That is all.

Mr. Milton: That is as far as we can go to-day.

Mr. Bulkley: We have two witnesses.

PLAINTIFF'S PROOFS.

HUGH PETERS, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Peters?

A. Englewood, New Jersey.

10 Q. What is your business?

A. In partnership in Wall street, Mackay & Company, I am one of the partners.

Q. What is the general nature of that business?

A. Banking and investment business.

Q. And do you buy and sell listed stocks?

A. Unlisted?

Q. Listed and unlisted?

A. All classes of securities.

20 Q. Did you ever buy and sell any of the stock of the Beech-Nut Packing Company?

A. Yes, sir; sold some today.

Q. Did you ever see any cigarette packages bearing upon them the word "Beech-Nut?"

A. Yes, sir.

Q. And how long ago was that, about?

A. It was in the late spring or early summer of 1921.

30 Q. What was the impression made upon your mind by seeing such packages of cigarettes with those words upon them?

A. I was very much surprised.

Q. Why?

A. My estimate of the Beech-Nut Company was that they wouldn't undertake that type of business.

Q. Were you previously familiar with the general type of business of the Beech-Nut Packing Company?

40 A. Yes, sir; we had handled some of their preferred stock.

HUGH PETERS—DIRECT.

Q. Well, I mean more particularly did you know of the variety of products which they were making and selling upon the market?

A. In connection with that preferred stock issue, I myself had to write the circulars, so I had to investigate it quite thoroughly.

Q. State whether you ever heard any questions asked or any inquiries made by anyone which would lead you to believe that they thought the same concern which put out the Beech-Nut cigarette and the Beech-Nut scrap tobacco also put out the Beech-Nut chewing gum and the Beech-Nut food products? 10

Mr. Milton: Just a minute, Mr. Witness. Will the Court direct the witness to answer the question yes or no.

The Court: You can answer that question yes or no. 20

The Witness: May I have that question repeated again? It seemed to me back end foremost. I didn't quite get that clearly.

Mr. Bulkley: Well, I am reading it from the defendant's record.

(Question repeated by stenographer.)

A. Yes.

Q. How often did you hear such inquiries or comments? 30

Mr. Milton: Objected to on the ground it is immaterial and irrelevant.

The Court: I will permit it.

A. I should say at least 20 times.

Q. And how were they made to you?

Mr. Milton: Objected to.

The Court: I will permit it.

PLAINTIFF'S PROOFS.

A. How were the questions made to me?

Q. Yes. How did you hear those questions, under what circumstances?

A. Well, I can give you one or two illustrations if I am permitted.

10 Mr. Milton: No, I would have to object to that.

The Court: You don't object?

Mr. Milton: I would have to object.

Q. Well, I put that in the form of a question to the witness, and ask him to state such instances or illustrations that he has in mind?

Mr. Milton: I object to that, sir.

The Court: I sustain the objection to that.

20 The Witness: Perhaps I can answer the other question.

(Question repeated by stenographer as follows:)

“Q. How were the questions made to you, how did you hear those questions, under what circumstances?”

A. In one instance from a person in a more or less similar line of business with myself who knew that we handled the Beech-Nut products and who spoke of it to me with some surprise.

30 Mr. Milton: Well, now, I move to strike that out, if the Court please.

The Court: Strike out “and who spoke of it to me with some surprise.”

Q. What did he say to you?

Mr. Milton: Objected to on the ground it is incompetent.

The Court: I sustain the objection.

40 (Exhibits before offered in evidence received and marked as follows:

HUGH PETERS—DIRECT.

D. 30, Judge Newton's trademark list.

D. 31, D. 32 and D. 33, bound volumes of trademark registrations.

D. 34, pamphlet of trademark classifications.)

Q. Have you found in connection with the sale of the stock of the Beech-Nut Company that the impressions which were gained by you and others had any effect at all upon the sale of Beech-Nut stock?

10

Mr. Milton: Objected to.

The Court: I will permit that.

A. The best answer I can give to that is that the fair proportion of the cases in which this was spoken of was by stockholders who asked for information in regard to it, because they thought it affected the value of their stock adversely.

20

Mr. Milton: I move to strike that out, if the Court please.

The Court: Strike it out, it is not responsive.

Q. In your opinion as a broker, selling the stock of the Beech-Nut Company, has the impression that the Beech-Nut Packing Company is engaged in the sale of tobacco and cigarettes in any way affected the sale of the stock of that company?

30

Mr. Milton: Just answer that yes or no, if you will, please.

The Witness: I don't believe I can without creating an improper impression.

Mr. Milton: Then I object to the question, sir, on the ground it calls for a conclusion.

Mr. Bulkley: I think the witness, if the Court please, may answer the question.

The Court: Why can't it be answered yes or no?

40

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PLAINTIFF'S PROOFS.

Mr. Bulkley: I think it can.

The Witness: I think it calls for a conclusion.

The Court: We don't want any conclusions.

Mr. Bulkley: May not the witness be permitted to answer it directly and then add such explanation as he may think is necessary to guard his answer as he seems to desire to so do.

Mr. Milton: That is objected to; I don't think that is a subject for opinion evidence.

The Court: I don't think it is either. I sustain the objection.

Q. When you saw this package of these cigarettes, were the packages covered with some translucent paper?

A. Yes, sir; I purchased a package in order to find out the maker.

Q. And did you perceive the name of P. Lorillard Company on the package of cigarettes that you purchased?

A. Not until after I had made the purchase and examined it carefully. I bought it under artificial light in the Shulte store; it was on exhibition in the basket there, with a label, quite a fair-sized label, about so big, "Beech-Nut cigarettes," and the price, but no name of any maker visible. I at that time didn't know who made it.

Mr. Milton: I move to strike out all the witness' answer after the words "I bought it under artificial light."

The Court: No, I will permit it to stand. He states what he did.

Mr. Milton: Will you permit the witness to state what appeared on the advertising card?

The Court: Yes, you may ask him that, if counsel does not.

HUGH PETERS—CROSS.

Mr. Milton: Counsel did, that is my objection. The witness is now describing an advertising card which we don't see.

The Court: I will permit it to stand. It tells the condition under which he bought the package of cigarettes, what he saw there, how it was displayed.

10

Q. What did you do in order to ascertain who was the maker of these cigarettes, not being able to see the name under this light?

A. I happened to have this original package in my pocket. It has a glaccine cover on it.

Q. What is that that you hold in your hand?

A. That is the original package I purchased at that time, which I put in the bottom drawer of my desk after sampling the cigarette. It has a glaccine cover, and I pressed down on the cover and held it to the light this way (indicating), and then could read the name "Lorillard."

20

Q. What impression did you get, first as to who put out those cigarettes, from seeing finally the name of P. Lorillard Company on the package which you bought?

A. I then got the definite impression they were put out by P. Lorillard Company.

Cross examination by Mr. Milton.

30

Q. What period of time elapsed between your first impression that the cigarettes were put out by Beech-Nut Packing Company and your information acquired in the manner you have described that they were put out really by Lorillard?

A. The length of time it required to make the purchase and examine the package, part of a minute.

Q. I see. So that practically simultaneously your impression was corrected?

A. As soon as I made the examination.

40

PLAINTIFF'S PROOFS.

Q. Yes, sir. Was this in a Shulte store that you—

A. It was in a Shulte stand, not a Shulte store.

Q. Where was the stand?

A. My memory of it is it was the stand that is in the Erie subway, Erie passageway in Jersey City, but I am not certain of that exact location, that is my impression.

10 Q. For what purpose had you stopped at the stand?

A. I stopped because I saw the exhibition of these cigarettes right beside the Beech-Nut chewing gum and other products for sale.

Q. You stopped, saw the package—

A. I stopped because I saw it, happened to glance over there and saw it.

Q. Saw the word "Beech-Nut" on the package of cigarettes, bought it for the purpose of finding out who
20 the maker was—

A. I bought it because I was completely thunderstruck with the idea that the Beech-Nut would manufacture those cigarettes.

Q. Let us understand that, Mr. Witness. If your impression was when you saw the package that the Beech-Nut Packing Company was the producer of this cigarette, why did you buy it, to confirm that impression?

A. Because I could hardly believe my eyes.

30 Q. So that you were not deceived, were you?

A. Deceived in the purchase?

Q. Yes.

A. Well, I made the purchase to prevent being deceived.

Q. Precisely. When you saw this package with the word "Beech-Nut" on it you bought it not as the casual public might buy, if I might use that impression, but for the specific purpose of ascertaining whether or not the Beech-Nut Company was the producer and manufacturer; that is right?

40

HUGH PETERS—CROSS.

A. I certainly did, because I heard only the day before they were making it, and had denied it, through my knowledge of the company and belief that they wouldn't do it, but I had no official knowledge.

Q. That is the first time you mentioned you heard it the day before, isn't it?

A. Yes, sir.

10

Q. And you had denied it?

A. Yes, sir.

Q. So that when you saw the package of cigarettes on the counter of the Shulte stand, then you were not deceived, were you?

A. I was under the impression I may have given an incorrect statement the day before to a client of ours.

Q. And you stopped to buy the cigarettes to find out whether or not that was true?

A. Yes, sir.

20

Q. Are you a cigarette smoker?

A. Yes, sir.

Q. What cigarette do you smoke?

A. Lucky Strikes.

Q. Were you then selling the preferred stock of the Beech-Nut Company?

A. We had completed the issuing of it; it was only in so far as we deal in the market from time to time, as stock may be offered, that is all.

30

Q. Which you, of course, would do for any customer, sell any reputable stock to any man who has the money?

A. Yes. We more or less make the market for that particular stock. They come to us because we were connected with the original issue.

Q. You did market the issue of the original stock?

A. We assisted in it.

Q. When was that?

A. I don't recall the exact time, prior to this some little time.

40

PLAINTIFF'S PROOFS.

Q. How long prior to it?

A. Couldn't tell you that without checking up.

Q. Approximately.

A. Well, at least some months, I would say at least some months.

Q. Can you fix how many months?

10 A. I can easily fix it by checking back, but not from memory.

Q. As a part of the campaign of marketing and selling the preferred stock of this company, were you furnished with a list of the products which it produced and manufactured and sold?

A. At that time, yes.

Q. And cigarettes were on that list?

A. They were not.

Q. Nor chewing tobacco?

20 A. No, sir.

Q. Nor tobaccos of any kind?

A. No, sir.

Q. So that when you approached the Shulte stand for the purpose of purchasing that pack of cigarettes, you were in the frame of mind of one who believed that the Beech-Nut Packing Company did not in fact manufacture or sell this cigarette?

30 A. I believed that before I saw the package even. I was somewhat shaken in the belief by the sight of the package.

Q. I say, when you approached the stand for the purpose of buying it, did you then believe—

A. I was not entirely convinced, no. I still thought it must be something wrong somewhere.

Q. This was really an investigation that you were carrying out, was it, for your own purposes? Is that right?

A. Well, yes, it was.

40 Q. How did the facts which you have just testified to become known to the Beech-Nut Packing Company and its lawyers?

HUGH PETERS—CROSS.

A. Why, I was quite surprised at the fact that the Lorillard Company should use a brand so similar, and I thought that the Beech-Nut Company were probably protected in the use of that brand, and I wrote and supplied them with that information, more or less as an inquiry at that time, and heard nothing from it since.

Q. When was that?

10

A. That was only a comparatively short time after I had made that purchase. I knew of no case at the time.

Q. Have you fixed the time when you made the purchase?

A. In the late spring or early summer of 1921.

Q. Of 1921?

A. Yes.

Q. Mr. Peters, were you a user of Beech-Nut Packing Company products prior to the time you made this purchase of cigarettes?

20

A. Yes, sir.

Q. Are you still a user of the products?

A. Yes, sir.

Q. What was there about the apparent addition of cigarettes to the Beech-Nut line that surprised and thunderstruck you?

A. Why, it seemed somewhat of a departure from their policy, and from the character of their business.

30

Q. You mean the goods are so different?

A. I mean that.

Q. Separate and distinct classes?

A. While they have a very diverse business in the main it is food products of some sort, and this was somewhat of a departure.

Q. You regarded that as a distinct line, I suppose?

A. What do you mean?

Q. You regarded that, meaning tobacco, as a separate and distinct line?

40

PLAINTIFF'S PROOFS.

A. I regarded it as somewhat apart from their usual line of products, yes.

Mr. Milton: I think that is all.

Mr. Bulkley: That is all.

10 PHILIP V. R. VAN WIRTH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Van Wirth?

A. In Summit, New Jersey.

Q. What is your business?

A. What is my business?

Q. What is your business; yes, sir.

20 A. I am the secretary and treasurer of the Electrical Securities Company.

Q. Did you ever see any package of cigarettes bearing the words "Beech-Nut" upon it?

A. Yes, sir.

Q. Where and under what circumstances?

A. Why, I saw them on some cigarettes packages.

Q. Where?

A. In New York.

Q. Whereabouts in New York?

30 A. On a stand in New York where they sold cigarettes and various other things.

Q. What was the impression that you gained from seeing those words upon that package?

A. I thought that the Beech-Nut Company had added another line to their ordinary line.

Q. Were you familiar with the Beech Nut products before you saw this package with the name of the brand on it, "Beech-Nut"?

A. Yes, sir; I was.

Q. To what extent?

PHILIP V. R. VAN WIRTH—CROSS.

A. Well, I had bought them, candies and the Beech-Nut bacon, and ginger ale, I think that was all that I—

Q. Was this a tobacco stand?

A. No, sir.

Q. What was it?

A. It was a newspaper stand and candies and newspapers and various things of that sort.

Q. How long a time did you remain under the impression that cigarettes were being sold by the Beech-Nut Packing Company under the name Beech-Nut?

A. Why, I remained under that impression until I inquired. I didn't investigate then at all. I simply saw them, noticed them and passed on, and then I was interested because I happened to be an owner of Beech-Nut stock.

Q. Of whom did you purchase that stock?

A. I don't remember now. I purchased it through the market, and I inquired, I thought the Beech-Nut Company had gone into another additional line.

Q. Of whom did you make this inquiry?

A. I made the inquiry of a friend, through whom I bought the stock, I think.

Q. Do you remember from whom you purchased this stock of the Beech-Nut Company? Who was the agent?

A. Yes, I purchased it through Mackay and Company, Mr. Murray of Mackay and Company.

Mr. Bulkley: That is all.

Cross examination by Mr. Milton.

Q. That is the house that the last witness, Mr. Peters, is connected with?

A. Yes, sir.

Q. Is Mr. Peters the friend of whom you inquired about the manufacture of Beech-Nut cigarettes?

A. I spoke to Mr. Murray; I think probably Mr. Peters, too.

PLAINTIFF'S PROOFS.

Q. I see. Did Mr. Peters arrange for your coming here today to testify?

A. He did.

Q. About how long in point of time did you remain under the impression that the Beech-Nut Packing Company was a producer of these cigarettes?

10 A. Why, about an hour or so, until I inquired. I had that impression until I inquired about it.

Q. You didn't buy any of these cigarettes?

A. No, sir.

Q. Was this at or about the time you had acquired the stock of the Beech-Nut Company?

A. This was some time after that, I think, I acquired the stock previous, I owned the stock at that time.

Q. You had purchased the stock previously?

A. I had purchased it previously; yes, sir.

20 Mr. Milton: That is all, I think.

Mr. Bulkley: The plaintiff rests.

(An adjournment was thereupon taken until Thursday, November 1st, 1923, at 10:30 o'clock A. M.)

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Beech-Nut Packing Co.,

vs.

P. Lorillard Company.

Thursday, November 1, 1923, 10:30 A. M.

(Case continued.)

Appearances as before.

Mr. Johnson: If the Court please, the plaintiff has several exhibits which have been stipulated into this case with the consent of defendant's counsel. Plaintiff would now like to offer those formally in evidence. They are Plaintiff's Exhibit No. 12, the scrap book of circulars and letters; Plaintiff's Exhibit No. 28, board of Beech-Nut labels displayed before the public, 1891 to 1921—that is that big board against the wall; Plaintiff's Exhibit 32, collection of defendant's posters and signs. That is the collection against the rear wall, mounted on some boards in three panels; Plaintiff's Exhibit 33, scrap book, collection of labels used by defendant; that is this collection here. These are all labels supplied by defendant and stipulated into this case. Plaintiff's Exhibit 34, scrap book, collection of specimens of defendant's publication advertising; that is this little book. The stipulations covering these are in the printed record. I presume your Honor does not care to have them read?

The Court: Oh, no.

Mr. Johnson: In addition to that, with consent of the defendant's counsel, we would like to offer certified copies of the decisions in the Patent Office case, between these same parties, the record

DEFENDANT'S PROOFS.

of which has been stipulated into this case. That is Plaintiff's Exhibit No. 41, certified copy of the decision of the Examiner of Interferences in Patent Office Trade Mark Opposition No. 2805, and Plaintiff's Exhibit No. 42, certified copy of the decision of the Assistant Commissioner of Patents in Patent Office Trade Mark Opposition No. 2805.

Mr. Cavanagh: If your Honor please, I would just like to state with respect to the exhibit board back there of the Beech-Nut advertising of the Lorillard Company that that does not include a complete collection of everything that Lorillard has ever put out respecting the advertising of its cigarettes. Of course, we have had a great many pieces of different advertising, as your Honor will understand.

(Exhibits referred to by plaintiff's counsel, are received and given the respective marks which counsel enumerated.)

DAVID H. BALL, called and sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Cavanagh.

Q. Your name is David H. Ball; you are of legal age; you reside in Mount Vernon, New York, and you are vice-president of P. Lorillard Company, the defendant in this case. Is that correct?

A. Correct.

Q. In what line of business is the P. Lorillard Company engaged in?

A. Tobacco business.

Q. How long have you yourself been engaged in the tobacco business?

A. In my thirty-fourth year.

DAVID H. BALL—DIRECT.

Q. Would you please give us a brief history of your experience in the tobacco business, including the positions you have held, the lines of the business in which you have been engaged and the like?

A. In the spring of 1890, I secured a position with Marburg Brothers, who were then engaged in the tobacco business in Baltimore, Maryland, as a retail salesman, and what we term a missionary man, advertising and selling to the retail trade and producing business by tacking signs and sampling the consumers. I remained in that capacity with Marburg Brothers until they sold out to the American Tobacco Company, which I think was in 1891, at which time I went with the American Tobacco Company and continued in their employ in that capacity until 1892, at which time I was sent to St. Louis and put in charge of one of their departments, called the Fine Smoking Department, as head salesman in that department, and I remained in that capacity several years and from time to time, as the American Tobacco Company's business grew and my efficiency seemed to impress them, and I was given charge of their various lines from time to time until it included plug tobacco, smoking tobacco, cigarettes, little cigars, cheroots, big cigars, snuff, and, in fact, practically every commodity in the tobacco line. I remained in St. Louis in that capacity until 1904, at which time I was brought to New York City, and put in charge with another gentleman of the Bull Durham and Cut Plug Department, where I remained about six years, I think, and in January, 1910, I was made assistant to one of their vice-presidents, Mr. P. S. Hill, and remained in that position until the dissolution of the American Tobacco Company, at which time I was appointed as vice-president of the P. Lorillard Company, and have occupied that position continuously up to the present time.

Q. During these years did you sell and supervise the selling of tobacco products throughout the United States?

DEFENDANT'S PROOFS.

10 A. Well, not during all of those years. During the time I was located in St. Louis, of course, I only had a specific territory, Missouri and Southern Illinois. When I was a retail man, I worked Minnesota, North Dakota and part of Wisconsin. After I came to New York, then I had the supervision over the Cut Plug and the Bull Durham business together with another gentleman, for the entire United States, and since I have been with the Lorillard Company, I have had supervision over the line which I have looked after for the entire United States.

Q. Now, during these years of your experience since you have been in the tobacco business, can you mention a few of the famous brands of tobacco which have come under your charge in the selling of the same; give us the names of some of them?

20 A. Bull Durham, Battle Axe, Duke's Mixture, Honest Scrap, Beech-Nut and Mechanics Delight, Climax, Planet, Sensation, Union Leader, and numerous other ones.

Q. In all your experience in the tobacco business have you ever known a tobacco concern that made and put out food products such as bacon, jelly, preserves, soft drinks, chewing gum or mint candies?

A. I never have.

30 Q. In all your experience in the tobacco business have you ever known of any concern that put out such food products as I have enumerated making and putting out a tobacco product?

A. I never have.

Q. In your experience have you ever known of different concerns using the same trademark, one for a tobacco product and the other for a food product?

A. Quite frequently. In fact, the custom is quite general.

40 Q. How generally, if at all, has it been the custom for concerns not engaged in the production of tobacco products to use trademark brands which are used by manufacturers of tobacco products?

DAVID H. BALL—DIRECT.

A. It has been quite general. In fact, there are quite a few of our brands alone used for various products.

Q. Can you name some of them?

A. Yes, sir. We have one exhibited there, Mogul, and there are our brands of Comet and Climax.

Mr. Scott: Before the witness continues this answer, I wish to object to this line of testimony on the ground of its immateriality. The testimony is evidently directed to showing that these labels are used upon different products, and it stops there. The parties are not parties to the case. It has no bearing upon any issue in this case. It was simply proving the existence of this mark upon different classes of goods by different makers. As far as that goes, it can in no way affect any suit here; there is no foundation for it, or even proof that the same parties do not own both lines of goods.

Mr. Cavanagh: This goes right to the very heart of this case, if the Court please. In their charge they have alleged that the goods are practically the same class and belong to the same group. Now it comes down to this question of different description of goods and different classifications. We are entitled to show that it is a general rule that the same name that is used for tobacco is used for other products, so that any member of the public would know that that is a custom or a general rule in the business. I think under every rule of evidence we are entitled to show that. This is of the essence of the charge against it.

The Court: I will not eliminate this class of evidence. I think it would be unwise to keep this class of evidence out. I will overrule your objection.

Q. To your knowledge for how long has this been the practice or the rule?

DEFENDANT'S PROOFS.

A. As long as I have been in business.

Q. Of using tobacco trademarks in other lines?

A. Yes, sir.

Q. Have you ever known any objections, to your knowledge, to be made of this practice, outside of this suit?

A. No, sir.

10 Q. Has any concern that you have been connected with in an official capacity, to your knowledge, ever made any objection to any other concern not in the tobacco line of business using one of your tobacco trademarks?

A. No, sir.

Q. I show you a package which is in evidence in this case as a product of the P. Lorillard Company, and which has been put upon the market since 1915. Will you kindly state what you remember about the placing of this package upon the market by your company and why this was done?

20 A. At the time of the dissolution of the American Tobacco Company in December, 1911, the bulk of what we term the scrap business was turned over to the Lorillard Company, and their big brand was "Honest." The year before the dissolution, or rather the year of the dissolution, which was 1911, the brand of Honest started to decline, and for three or four succeeding years, the decline was gradual all the time, and that also applied to some of our other brands, and I went out myself to make
30 a personal investigation to ascertain the cause of this decline. And after looking the field over very carefully I decided that the taste of the consumer was changing somewhat; that brands that were somewhat sweeter than ours seemed to be growing, and our brands that were less sweet were declining, so I came back and reported it to our president and suggested that we endeavor to get up a new formula that would be better suited to the taste that seemed to be changing at the present time; and after experimenting quite a while he brought over a sample
40 package of a piece of goods that struck me as being an

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ideal product to put out. So we decided to put out another brand, and in looking around for a brand, as is our usual custom, I referred to our list of brands to see what were in a way dormant, and that had been turned over to us as our property by the American Tobacco Company, and one of the first brands I noticed was the brand of Beech-Nut, and that seemed to me to be a very appropriate name for this article, and we decided to use this brand for that purpose. 10

Q. And when was this, at what time?

A. This was in the fall of 1914, I think.

Q. And at that time were you in complete charge of the scrap tobacco department?

A. I was, the selling end of the business.

Q. What is included in the tobaccos that you had charge of the selling of, what was your department at that time?

A. I had charge of all the smoking tobaccos, all the plug tobaccos, all the scrap tobaccos, all the fine cut tobaccos and part of the time, little cigars. 20

Q. And you at that time were a vice-president of the Lorillard Company?

A. I was vice-president of the Lorillard Company.

Q. Now you have referred to a list from which you selected this Beech-Nut tobacco mark.

A. Yes.

Q. Is this Exhibit D. 35 the list (indicating)? 30

A. This is the list that was turned over to me at the time of the dissolution of the American Tobacco Company, some time in December, 1911, and has been continuously in my possession since that time and has been referred to by me on numerous occasions.

Q. In that list have you from time to time selected other names of brands and put them on the market?

A. We have.

Q. Can you name one or two besides Beech-Nut that you also selected? 40

DEFENDANT'S PROOFS.

A. Comet, Pioneer, Yacht Club, and probably there were some others in addition to Beech-Nut.

Q. Under what heading does the Beech-Nut appear on that list?

A. Under the heading of Luhrmann & Wilbern.

Q. Is there any sub-division heading there?

10 A. That is a sub-division heading, Luhrmann & Wilbern. Luhrmann & Wilbern made only scrap tobaccos at the time they were turned over to the P. Lorillard Company, and of course the Luhrmann & Wilbern business was turned over in a body and the brands enumerated.

Q. Now, in relating the history of this Lorillard Beech-Nut scrap tobacco which you marketed in 1915, will you please tell the Court, if you can, how you came to adopt this form of package?

20 A. Well, after referring to our list and ascertaining that we owned the brand, I sent for one of my assistants and asked for him to get for me a bag in which we packed Beech-Nut and he brought the old style package—this is the bag, sample of the bag that he brought at that time, and it immediately occurred to me that this package was out of date; in the first place, it had too much reading matter on it.

30 Mr. Milton: What exhibit number is that, please, so that we may have it in the record?

Mr. Cavanagh: It is a Patent Office exhibit.

Mr. Milton: All right.

The Court: Just refer to it for the purpose of the record.

Mr. Cavanagh: Just refer to it as the Weis-singer Beechnut bag.

Mr. Milton: Patent Office Exhibit No. 17.

Mr. Cavanagh: Patent Office record "P. Lorillard Co. Exhibit No. 17."

DAVID H. BALL—DIRECT.

The Witness: All right.

(Answer read.)

A. (Continuing.) It had the name of the Harry Weisinger Tobacco Company that had long since gone out of business, having sold their business to the Continental Tobacco Company, and later transferred to the American Tobacco Company, and I also noticed that it had a picture of a squirrel on the package, which immediately brought to my mind the fact that there was an active brand on the market by one of our competitors which also had the picture of a squirrel, and as is always our policy, we don't desire to, when we are putting out or revamping an old brand, to do anything that might in any way conflict with any tobacco product that is on the market and belongs to any of our competitors, and I sent for a lithographer and gave him my idea, as is usually the case, and asked him to draw a pencil layout of the brand, and while I don't recall the first pencil layout that he brought to us, but I do recall the instance of the selection of the two nuts appearing on our Beech-Nut, this Beech-Nut package, on account of—

Mr. Cavanagh: Just put in Defendant's Exhibit No. 1.

A. (Continuing.) —on account of the argument that came up on one of these sketches that was brought in as to the representation of the Beech-Nuts for our president entered into the argument and criticized the sketch that he had drawn, and the artist or lithographer seemed to be just as decided in his views that it was a good representation, and our president said, "I will bring in a couple of beechnuts to you and you can see how much different they are." And that is how I come to recall those nuts. It was rather an odd incident that came up in the line of business, it is out of the ordinary.

DEFENDANT'S PROOFS.

Q. You have spoken of another package which was on the market by one of your competitors.

A. Yes, sir.

Q. You have spoken of another package which was on the market by one of your competitors which bore the representation of a squirrel. Can you produce this package?

10 A. That is the package, the Hazel Nut made by John J. Bagley & Company.

Mr. Cavanagh: Package of Hazel Nut tobacco produced by the witness is now offered in evidence as Defendant's Exhibit D. 37.

(Received and marked Exhibit D. 37.)

Q. Will you please state, if you know, how you came to adopt the oval on that tobacco package of Lorillard, 1915, which is cross exhibit No. 1?

20 A. Well, to state positively in this particular instance would be probably somewhat difficult, but we try to make our packages as strong as we can when we put them on the market, we try to make our design as different as we can to give them an individuality and ovals have been used on many brands of tobacco in order to give more space for the name. Now, if we had used a circle on that, for example, we would have had to pinch the name of the brand down to a point where it would make it less conspicuous than it is.

30 Q. Can you produce any other specimen of scrap or chewing tobacco package in which the brand is owned by your company which uses an oval?

A. We have a brand of Bag Pipe.

Q. How long has that brand been on the market to the best of your knowledge?

A. That brand has been on the market—that was one of the brands that came over with Luhrmann Wilbern business, and where it originated, I don't know, but it has been a rather inconspicuous brand and we did the

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same with this brand here about two years ago that we did with Beech-Nut. We owned the brand and we remodeled it, dressed it up in what we thought was a more attractive design and put it out in that form.

Q. But to the best of your knowledge that Bag Pipe brand has always used an oval?

A. Oh, yes, there was always an oval on this package, and that was the trademark, those two Scotch pipers.

Mr. Cavanagh: The Bag Pipe chewing tobacco package produced by the witness is offered in evidence, as D. 38.

(Received in evidence and marked D. 38.)

Q. Mr. Ball, from your knowledge of the tobacco business, and particularly chewing tobacco and scrap tobacco, would you say that these scrap tobacco or chewing tobacco packages have a certain standardized individuality or shape or form?

A. Yes. Scrap tobacco has been put up almost universally in that form for the last—well, as far back as scrap tobacco has been made that I can remember. That is evidenced by that line of leading brands that we have over there on the table. Now, the Hazel Nut package is not a scrap tobacco. That is a long cut, you understand.

Q. For the information of the Court, if you can from where you are at present, will you just enumerate those chewing or scrap tobacco brands and tell, if you know what concern controls or owns them. Do you know those brands?

A. Union Workman is owned by Scott & Dillon; Yankee Girl, same; Beech-Nut by ourselves; Honest by ourselves; Mail Pouch by the Bloch Brothers; Open Book by ourselves; Red Man by the Pinkerton Tobacco Company; Polar Bear by ourselves; Havanna Blossom by ourselves; Pinch Hit by the Pinkerton Tobacco Company.

The Court: You skipped Hazel Nut.

DEFENDANT'S PROOFS.

The Witness: Hazel Nut by the John J. Bagley Company. His question was scrap tobacco and Hazel Nut is a long cut, that is the reason I omitted it.

Q. But both long cut and scrap tobacco are used for chewing purposes?

10 A. Both are used for chewing purposes.

Q. Now, as one familiar with the Beech-Nut tobacco of the Lorillard Company, as illustrated by that package of 1915, Defendant's Cross Exhibit No. 1, can you tell us how you happened to those red radiating lines?

A. At that time the big sellers were solid colored packages, Red Man, Honest, Polar Bear, and the only exception were the two packages of Scott & Dillon, which were minor brands.

Q. What were they, just name them?

20 A. Union Workman and Yankee Girl. And in remodeling the Beech-Nut package we wanted to dress it up as much as possible, entirely different from anything in the tobacco line, and we did not want to use round symbols or square symbols as our competitors were using, and the question of these rays was suggested by some one—I may have suggested it myself, I don't recall—but it struck me as being a good proposition, giving this package individuality over any others that were on the market in that line at that time.

30 Q. To what do you attribute the success of the sale of your Beech-Nut tobacco like that 1915 package?

A. Well, there were many features that entered into the cause for the success of Beech-Nut. I think in the first place, in putting out a brand of tobacco or anything else in the tobacco business, it may not be so in other businesses, but in the tobacco business, I have observed in my experience that if you are fortunate in putting a brand on the market at the psychological moment you will go very much faster, and probably make a success

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with that brand, whereas, if it had been put out three or four years earlier or three or four years later, it might have been quite a failure, and in this investigation that I made when I went out in the territory, I found a great many people, consumers I interviewed largely, because he is the man you have got to get in the tobacco business—I found a great many consumers that were very much dissatisfied with the brands that they were using. One of the most common expressions of a consumer who is dissatisfied with the brand that he has been using, “Well,” he says, “it ain’t as good as it used to be.” Well, when a man gets that idea into his head that it isn’t as good as it used to be, he is looking around for something else. That was one of the causes that made me so enthusiastic in getting our president to originate a little different formula, and the fact that this formula that he originated suited the taste, hit that change that so many people were seeking at that time, was one cause backed up by the manner in which the brand was marketed. We, I think, did a very thorough job of work when we introduced it. We worked it very hard with the dealers. We made quite an inducement to the dealer to push the brand, over and above any other brand of scrap tobacco that he was handling at that time, by giving him four packages free with a carton. We, I think, did the most effective advertising, and what we term missionary work, which is sampling, that was ever done on a brand of tobacco, and that was probably due to the enthusiasm that we created in our men and the response that we received from the consumer whom we sampled. They all liked the tobacco. Everybody had a good word for it and they had their various ways of expressing it. And if I may be allowed to give an experience that I had with one man, a switchman that I went to, and asked whether he chewed tobacco, to my astonishment, he pulled out a package of Beech-Nut, and I asked him how he liked it, “Why,” he says, “that’s the best piece of

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chewing tobacco I ever got a hold of." I says, "What is the difference between that and what have you been using?" This particular fellow said, "I have been using Honest." I said, "What is the difference between Beech-Nut and Honest?" "Why," he says, "it is sweeter, and that is the cleanest piece of tobacco I ever got hold of." He says, "It feels clean," and he held up the package. That was his expression. Now, that man did not mean that it felt clean, he meant that it was a soft, silky pliable chewing tobacco, but that is the way he expressed it. And those things encouraged us to believe that we had hit upon a formula that would suit the people.

Q. In carrying out what you call the missionary work on this Beech-Nut tobacco during the campaign of placing it before the public or on the market, just what procedure did you follow in that missionary work? Tell the Court, so he will understand.

A. Our first method, of course, was to ship our goods to the jobbers, and after the goods reached the jobbers, then we put our men to work on the brand, and to make certain that we had as good a piece of goods as we thought we had, we at first limited it to putting it out in six towns, two towns in Pennsylvania, one in New York, and three towns in Ohio, the center of the big scrap consuming territory. And after those towns had been worked by our retail men, by soliciting orders from the retailer for the account of the jobber, the jobber had delivered it, then our men went out and visited the consumers, ascertaining first whether or not they chewed tobacco, and if they chewed tobacco then we handed them a sample, then we put our advertising matter up in the stores, using window posters and window pieces and dressing windows, using our cartons and dummy packages and things of that kind to make window displays. That was the method we used principally, but our big effort, and I think the work that got us the best results, was the sample.

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Q. Is that the procedure you use in presenting any
advertising campaign for conducting a campaign?

A. That is the general procedure; yes, sir; although many times brands are put out broadcast, without trying them out in certain sections as we did with this one.

Q. Now, at the time you were conducting this intensive campaign on this Lorillard Beech-Nut scrap tobacco or chewing tobacco, how many men were in your sales department under your direct charge? 10

A. There was approximately 300.

Q. And how many employees were under your charge or in your department? I mean, what was the total of the employees in your department?

A. Well, in the selling end of it, there was something over 300, and in our auditing end of the business, there was approximately 250.

Q. And during that intensive campaign, did you put the entire strength of your department back of that Beech-Nut tobacco? 20

A. At that time, when we started we had our business divided into departments, and the brand of Beech-Nut was put out by the scrap department. In the scrap department, we had some 50 or 75 men, and during that time we put the entire force of the scrap department on the brand of Beech-Nut working nothing else.

Q. From your experience in the sale of chewing and smoking tobaccos, do you know of any other tobacco other than Beech-Nut considering the time of its appearance on the market that had a relative or corresponding growth in sales as compared with Beech-Nut, and if so, will you name the brand? 30

A. Yes, I have known several. Honest was one of them. Honest was a brand that came into the market very rapidly and then, one of the most phenomenal successes ever made in the tobacco business, going back a little farther, while it wasn't a scrap brand, it was a 40

DEFENDANT'S PROOFS.

chewing tobacco, was Battle Axe plug. Battle Axe plug, I think obtained a bigger volume of business in two years than ever was obtained by any brand that was ever put out in the world. I think the volume of Battle Axe business ran up to 30,000,000 pounds in two years.

10 Q. Is this the Honest package of scrap to which you referred as having had a great growth?

A. This is the tobacco.

Q. Can you produce for the information of the Court any figures or data illustrative of the growth of the Honest scrap?

A. Yes, sir.

Mr. Cavanagh: I offer in evidence the package of Honest scrap tobacco produced by the witness.

(Received and marked Exhibit D. 39.)

20 A (Continued.) The first year Honest was put on the market, in 1906, it sold 1,316,242 pounds; the second year, 1907, 5,290,828 pounds; the third year, 1908, 11,538,322 pounds; 1909, 16,561,659 pounds; 1910, 18,527,034 pounds. Now, I might call your attention to this, that at the time Honest was put on the market the volume of the scrap business was very much less than it was in 1915.

Q. Why was that?

30 A. Well, scrap business started in the 90's in a very limited volume, and it never got any very great big volume until the brand of Honest came on the market, and it was probably due to the fact that Honest was campaigned very heavily, and it has been my experience that in campaigning any particular line of tobacco business it always produces a greater volume, on that particular line? Then, in 1908, 1909 and 1910, there were other brands campaigned and the scrap business in what we call the big scrap territory ate up the plug business, so that in later years the plug business has almost been eliminated
40 in this big scrap territory.

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These figures also show, as I related previously, 1910 was our big volume year; 1911, the last year of the American Tobacco Company, the brand dropped from 18,527,000 to 17,703,000; 1912, 16,438,000; 1913, 15,139,000; 1914, 13,512,000, when our business commenced to slip, and then we commenced to get uneasy, and I went out and made as careful an investigation as possible.

Q. Just go down the list and give the rest of the figures, so that we will have the record complete.

A. Subsequent—

Q. Yes.

A. 1915, 11,721,000; 1916, 10,474,000; 1917, 9,773,000; 1918, 6,682,000; 1919, 6,988,000; 1920, 3,699,000; 1921, 3,197,000; 1922, 2,810,000.

Q. Have you the figures there of any other—

A. I have the figures here of Polar Bear.

Q. Scrap brand which has had a large sale and decline?

A. Yes.

Q. Could you at your convenience read these figures into the record?

A. Polar Bear was one of the first brands of scrap tobacco that was put on the market in a limited way by a small concern in Cincinnati called the Luhrmann & Wilbern Company, and the first figures we have are in 1902, 4,260,000—I guess that 5,260,000 in 1902 probably represented 60 or 70 per cent. of the scrap business, it was so small at that time. Today it has run up close to 100,000,000 pounds.

In 1903, 5,491,000; 1904, 5,731,000; 1905, 6,278,000; 1906, 6,819,000; 1907, 5,405,000; 1908, 3,984,000; 1909, 3,157,000; 1910, 2,813,000; 1911, 2,743,000; 1912, 2,404,000; 1913, 2,707,000; 1914, 2,595,000; 1915, 2,297,000; 1916, 2,491,000; 1917, 2,155,000; 1918, 1,518,000; 1919, 1,485,000; 1920, 958,000; 1921, 800,000; 1922, 778,000.

DEFENDANT'S PROOFS.

Q. Does this represent a Polar Bear package of chewing tobacco that you have mentioned (indicating)? A Yes, that is our brand, Polar Bear.

Mr. Cavanagh: The Polar Bear package of chewing and smoking tobacco is offered in evidence as Defendant's Exhibit D. 40.

10

(Received in evidence and marked Exhibit D. 40.)

Q. Now, Mr. Ball, can you give the Court from your wide experience in the tobacco business some idea of the territory or localities in which the scrap tobaccos are sold or consumed, that is, where the consumers principally are, for scrap tobacco?

A. You mean at the present time?

Q. Yes, historically and at the present time.

20 A. The scrap tobacco originated practically in the State of Ohio, and it spread from Ohio in through Michigan, Indiana, Illinois, Kentucky, bordering on the Ohio River, West Virginia, Pennsylvania and New York State. That is what we term the big scrap tobacco territory; but in the last four or five years, since we have been campaigning our scrap business more intensively, it has spread to all sections of the United States. The section that we have the last business is the New England territory, they don't seem to take to that type of chewing tobacco up in that part of the country, but we are selling
30 Beech-Nut tobacco generally throughout the United States today.

Q. Well, what class of people generally use chewing tobacco?

A. Well, as a whole I would say mechanics, manufacturing people and agricultural people are the largest consumers of chewing tobacco.

Q. How about miners?

40 A. Miners in some sections use quite a little scrap tobacco, but miners, particularly Pennsylvania miners have

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been users of long cut tobaccos for a great many years, and they still use quantities of long cut tobaccos for chewing purposes.

Q. You don't sell much to women and children, do you?

A. I am sorry to say we don't. It is an accomplishment they have not acquired yet.

Q. Will you please outline for the benefit of the Court, so that he will understand the situation, the investment of P. Lorillard Company in the manufacture and sale of this Beech-Nut chewing tobacco from the time the present package was placed on the market in 1915, to the year of 1921, and refer to any memorandum you may have. Tell us where that memorandum was obtained (indicating).

A. I have had a memorandum made up by the auditing department, based on the value of our property that proportionately would apply to the brand of Beech-Nut where it is manufactured. If, for example, we had a factory that made 10,000,000 pounds of tobacco and 5,000,000 pounds of that was Beech-Nut, we would tabulate half of the value of that factory that would apply to the brand of Beech-Nut investment in that plant. Now, the real estate and building investment in 1915, was

	\$ 83,946.90	
In 1916,	138,430.96	
In 1917,	164,724.16 at Middletown, and	
	44,512.38 at Marion.	30
In 1918,	151,740.09	
In 1919,	148,830.85 at Marion, and	
	181,029.85 at Middletown.	
In 1920,	357,284.23 at Marion, and	
	284,743.88 at Middletown.	
In 1921,	541,781.89 at Marion, and	
	241,908.51 at Middletown, and	
	140,853.30 at Louisville.	

DEFENDANT'S PROOFS.

Now, under machinery investment,

	In 1915, Middletown,	\$ 90,140.55
	In 1916,	160,174.75
	In 1917, in Marion,	13,765.65
	Middletown,	229,870.02
	In 1918,	236,585.56
10	In 1919, at Marion,	54,681.61
	Middletown,	289,019.31
	In 1920, at Marion,	143,913.15
	Middletown,	322,284.62
	In 1921, at Marion,	267,466.10
	Middletown,	270,285.70
	Louisville,	131,646.01

Now, our advertising and selling expense,

	1915,	\$239,888.39
	1916,	155,097.43
20	1917,	109,188.91

Q. Mr. Witness, may I interrupt you just a minute. I think you have duplicate copies of that, and plaintiff's counsel would like to follow you along.

A. Yes, sir (copy handed to plaintiff's counsel).

A. (Continuing):

	1918,	\$134,101.68
	1919,	218,347.46
	1920,	455,593.41
30	1921,	602,882.35

Investment in raw materials, leaf and casing:

1915—I will just give the totals of this. Will that be all that is necessary?

Q. Yes, that will be sufficient.

	A. 1915,	\$ 912,813.12
	1916,	2,070,949.83
	1917,	3,645,727.04
	1918,	4,567,505.18
40	1919,	6,573,413.19

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1920,	7,591,770.00
1921,	6,273,539.28

Wrapping material:

1915,	\$ 87,461.84
1916,	247,339.93
1917,	559,060.73
1918,	376,199.04
1919,	670,599.23
1920,	1,380,533.64
1921,	895,990.10

10

Revenue stamps:

1915,	\$ 597,374.19
1916,	1,296,549.48
1917,	1,865,266.13
1918,	2,474,627.95
1919,	4,807,557.71
1920,	5,604,870.06
1921,	5,588,187.28

20

The grand total by years of the investment is as follows:

1915,	\$2,010,524.99
1916,	4,094,066.52
1917,	6,649,255.85
1918,	7,974,678.51
1919,	12,991,824.52
1920,	16,289,273.10
1921,	15,116,610.66

30

Employees engaged in the manufacture of Beech-Nut chewing tobacco as follows:

1915,	172
1916,	360
1917,	554
1918,	523
1919,	713
1920,	809
1921,	900

40

DEFENDANT'S PROOFS.

Q. Can you produce any statement from the records of your company showing the total advertising expenses of the Lorillard Company on all these brands for the years 1911-1922, inclusive?

A. Yes, sir.

Q. Will you read that list into the record?

10 A. 1911, we spent:

1911,	\$ 172,373.10 (one month)
1912,	5,190,436.25
1913,	6,294,942.46
1914,	6,235,563.14
1915,	4,597,163.83
1916,	4,514,785.69
1917,	3,805,501.96
1918,	4,575,280.98
1919,	4,164,221.20
20 1920,	2,041,325.18
1921,	3,276,274.66
1922,	4,191,068.06

Q. Why was the advertising expense so small in 1911?

A. Well, in 1911, we only had one month, the month of December. You see we did not commence to function till December 1, 1911.

Q. Now, Mr. Ball, how many ounces of tobacco are in that Beech-Nut 1915 package, your present Beech-Nut package?

30 A. Two ounces at the present time.

Q. And what is the retail price of that package?

A. Ten cents a package.

Q. And how many ounces are in the ordinary scrap tobacco that is on the market to your experience?

A. There is only one today that is any smaller, all the others range from $2\frac{1}{4}$ to $2\frac{1}{2}$ ounces. The smaller one—the two smaller ones that I recall, one is the Mail Pouch, and the other our brand of Havana Blossom. They are $1\frac{3}{4}$ ounces.

DAVID H. BALL—DIRECT.

Q. But the usual, ordinary package of scrap on the market is a larger package?

A. A larger package.

Q. But the prices are the same, ten cents?

A. Ten cents.

Q. Now, the defendant has charged in this case that your Lorillard scrap tobacco is a cheap tobacco. What have you to say to that?

A. Well, comparing it with the popular sellers today in chewing tobacco, such as Climax, Star, Horse Shoe, which are the big popular sellers for which they pay 90 cents a pound, Beech-Nut costs a consumer 80 cents a pound, and it would seem to me that that charge is without foundation.

Q. Well, now, just turn your attention to the chewing tobaccos of the type called scrap that are on the market. How does Beech-Nut compare with those in its quality and price?

A. Well, Beech-Nut chewing tobacco is the best piece of tobacco on the market in our opinion. And as I say, there are only two other smaller brands that sell for more money than Beech-Nut, and it is made from the very finest quality tobaccos of its kind that we can buy.

Q. Isn't made from sweepings or clippings or anything of that sort?

A. And— (interrupted.)

Q. Is it?

A. No, sir. There are some cigar clippings in it. There are some tobaccos in Beech-Nut tobacco that go in cigars that sell for three for fifty cents. It is not all made up of the kinds of tobacco, but there is some of that type of tobacco in it, but Beech-Nut is made from the very best types of that kind of tobacco that are produced.

Q. It is made from expensive tobacco?

A. Yes, sir.

DEFENDANT'S PROOFS.

Q. From your experience in the tobacco business and particularly with chewing tobaccos, plugs and the like, what do you—how do you account for the fact that the sales of a brand of tobacco will rise and then fall, as in the case of Honest plug?

10 A. Well, that can be attributed, I think, to the change in the taste of people more than anything else.

Q Now, earlier in your examination, Mr. Ball, you stated that you obtained the name "Beech-Nut" from this list, brand list, I may call it, Exhibit D. 35, at the time that you made the selection from this list, was the Bag Pipe tobacco on the market?

A. Yes, sir.

Q. That was on the market?

20 A. That had quite a little volume of business at that time.

Q. Was Honest scrap on the market?

A. That was a big seller.

A. Natural Leaf?

A. Yes, sir.

Q. Old Nut?

A. Yes, sir.

Q. Polar Bear?

A. Yes, sir.

Q. And Scrap Iron?

30 A. Yes, sir.

Q. You had all those different brands on the market?

A. Yes, sir.

Q. You have mentioned Star, Horse Shoe and Climax brands. Are those plug brands?

A. Yes, sir.

Q. They are not chewing or scrap tobacco like the Beech-Nut?

A. No, sir. They are chewing tobacco but not scrap tobacco.

4 40 Q. They are a plug tobacco?

DAVID H. BALL—CROSS.

A. Yes, sir.

Q. Now, Mr. Ball, in getting up the present Beech-Nut package, did you or your company, you speaking as an official, from your knowledge of the business and of the history of that package, have any intention or purpose of marketing it on the reputation of the Beech-Nut Food products?

A. Absolutely not. We did not consider them or think of them at the time we got out the brand of tobacco to my knowledge.

Q. What is the reason for your answer? Why didn't you consider them?

A. Because their products is so entirely different from ours. The only thing that we think of when we get out a brand of tobacco is other brands of tobacco products. We would not want to put out a brand of scrap tobacco similar to a brand of our competitors of long cut, but when it comes to considering other products, it does not enter our minds, not for a minute. There cannot be any similarity between tobacco in my opinion, and bacon or jams or jellies or chewing gums.

Q. You are speaking as a tobacco man, now?

A. That is all I know. I have never been in any other business but the tobacco business, and I am sorry I don't know more about that.

Mr. Cavanagh: That is all the direct, your Honor.

Cross examination by Mr. Scott.

Q. You have given a statement, Mr. Ball, of the advertising expenses. About how many brands does that include, all of them?

A. That includes our output.

Q. All of the Lorillard brands; about how many are there?

DEFENDANT'S PROOFS.

A. Oh, there is probably fifty brands that we advertise, probably not that many. We advertise our principal leaders, probably twenty-five of any consequence.

Q. You have referred to and read some figures, regarding the sales of Honest Sscap. This is a tobacco made by the Lorillard Company?

10 A. Yes, sir.

Q. And marketed by the Lorillard Company itself?

A. Yes, sir.

Q. Not supplied to some one else to market?

A. No, sir.

Q. Marketed by the Lorillard Company?

A. Yes, sir.

Q. Is the name Lorillard to be found upon that package?

A. No, sir.

20 Q. Does this occur in the name of any of your other brands, that the name "Lorillard" is not put on?

A. Yes, sir.

Q. What other brands?

A. I think the brand of Union Leader, if I recall correctly.

Q. Do you recall any more?

A. I don't have any at mind right now.

Q. Do you remember about Polar Bear, whether Lorillard's name is on there or not? I ask you whether you

30 remember or not?

A. No, I don't remember.

Q. You don't remember one way or the other?

A. No, sir.

Q. This question, then, of whether the Lorillard name is on a package is a matter with which you don't think it is worth while to charge your mind, I suppose?

A. Well, if I had thought a question of that kind would have come up, I would have familiarized myself with it, but if you will allow me to explain why the Lorillard name is not on the brands, I would be glad to do so.

DAVID H. BALL—CROSS.

Q. Pleased to hear you. Go ahead.

A. In the change of anything on a live brand, you frequently take a chance of prejudicing the consumer. I recall an experience I had with the American Tobacco Company years ago, with the brand Duke's Mixture. We put a coupon in it one time in one section of the country and left it out in other sections. And there was a "G" 10
put on the package.

Q. A "G"?

A. A "G" put on the package to indicate at the factory that the brand had coupons in it, and Georgia was one of the states in which the coupon was packed, and when the coupons were discontinued, they left off the letter "G" and that small letter, not much larger than a pea in a circle caused the loss of quantities of business, the consumer got it in his mind that when that "G" was off of there, the tobacco wasn't as good as it was with 20
the "G" on it. The imagination is a powerful factor in the tobacco business. Now, these brands that you mentioned, Honest and Union Leader were brands that were originated by the American Tobacco Company, and the custom of the American Tobacco Company in many instances at that time, was to leave their name from the package, and they had some very good reasons for doing it, the particular reason was that the American Tobacco Company had a big volume of the business, and they were 30
looked upon as a great big trust and they did not care about exploiting that in the minds of the consumer, so they left the name off of the package. That custom continued up until the time of the dissolution of the American Tobacco Company, and at the time of the dissolution we had all been schooled in that school, and we thought it was all right. But as time went on, some years later, we commenced to feature the value of the Lorillard name, and today every package that we put out bears the name of the Lorillard Company. 40

DEFENDANT'S PROOFS.

Q. This letter "G" that you refer to, that was on what product? I have forgotten it.

A. Duke's Mixture.

Q. And the package before the "G" was removed was left otherwise unchanged, was it not, when the "G" was taken off?

10 A. Yes, sir.

Q. So that the package was identical before and after except for this little letter "G," no larger than a pea, I think you said?

A. Yes, sir.

Q. And that proved to be a very important factor in the impression made by that package upon the consumer?

A. In that instance, in that particular state. The reason I mention that is because I came in contact with Georgia with those conditions. They were quite amazing,
20 that such a small change would cause the effect that it did.

Q. Was that in that state only, or was it general?

A. That was where I experienced it.

Q. That was where your knowledge of it extended?

A. I mentioned that as an instance where we were always very careful not to change a package. We have some packages today that are big sellers, and as long as they sell, we jealously try to keep them identical with what they have been.
30

Q. I suppose there is danger of losing the benefit of the past reputation by changing this package in that way?

A. Well, it frequently affects brands.

Q. As it did there in the case of this Duke's Mixture?

A. Yes.

Q. And you guard very carefully against that?

A. Yes.

Q. This Polar Bear brand, to which you referred, is one, I believe, you purchased from the Luhrmann & Wilbern Company or came under a court decree, is that so?

DAVID H. BALL—CROSS.

A. Yes, the Luhrmann Wilbern Company was one of the companies that was turned over to the Lorillard Company as a whole by the American Tobacco Company in December, 1911.

Q. I wonder if on this table there is a Polar Bear package such as used before the conveyance to the Lorillard Company?

10

A. I don't know. There is a package there.

Q. That package, I think, has P. Lorillard on it, has it not?

A. Yes, sir.

Q. Do you remember how this package was gotten up when the tobacco was gotten out by Luhrmann & Wilbern?

A. Well, it must have been in the '90s.

Q. Well, I didn't ask when, but in what kind of a package, was it the same package as that?

A. I think that that is the same package other than our name has been added to it as successors.

20

Q. And your memory would be that that package as put out by Luhrmann & Wilbern was identical with the one you hold in your hand, except that it would not have had on it, the name P. Lorillard?

A. That would be my memory.

Q. And that is in accord, is it not, with your statement just made that it is important to preserve the identity of these various brands?

30

A. Yes, sir. That is one of the instances that we may take exception to where at times we put our names on brands, and that was a custom that was followed.

Q. Surely.

A. By the American Tobacco Company.

Q. But did you not disturb the identity other than by putting on P. Lorillard at the bottom?

A. No, sir.

Q. And it would have been against your policy to do so?

40

DEFENDANT'S PROOFS.

A. Yes, sir.

Q. Now, how about this Honest Scrap. Do you remember whether that was one of those brands that came to you by conveyance from Luhrmann & Wilbern?

A. That was one of them. There it is.

10 Q. We have here, Exhibit D. 39, package of Honest Scrap that you referred to before. How does the package as put out by Luhrmann & Wilbern compare with that one?

A. In what way?

Q. In design and dress and ornamentation?

A. Well, one of them is black and the other is red. One is Polar Bear, the other is Honest.

Q. You misunderstood me. With the Honest Scrap as put out by Luhrmann & Wilbern?

A. Well, the Luhrmann & Wilbern never marketed the brand of Honest Scrap.

20 Q. What company did you get that from?

A. The American Tobacco Company.

Q. Well, I was wrong in the ownership.

A. The Luhrmann & Wilbern Company made this tobacco for the account of the American Tobacco Company who marketed it.

Q. It was marketed then by the American Tobacco Company?

A. Yes, sir.

30 Q. And when they marketed it, did it have a bag with a design substantially similar to this one on Exhibit 39?

A. Yes, sir.

Q. So that when that Honest Scrap was transferred from the American Tobacco Company to the Lorillard Company the style of package was carried forward practically in its identity?

A. Yes, sir.

Q. That again was in pursuance of the policy that you outlined, I suppose, some time ago?

40 A. Yes, sir.

DAVID H. BALL—CROSS.

Q. You mentioned a brand called Bag Pipe. Was that a brand the Lorillard Company acquired from Luhrman & Wilbern?

A. Yes, sir.

Q. The Bag Pipe package to which you referred is designated Exhibit D. 38. Is that identical package one that was gotten out since the ownership by the Lorillard Company?

A. Yes, sir.

Q. And is it the same in the style of the package and design as it was before it was acquired by the Lorillard Company?

A. No, sir.

Q. In what way does it differ?

A. Oh, it has changed in many ways. There is less printing matter on it and it is more striking in color; it is a complete change.

Q. Have you a sample in this collection here of that?

A. I don't know that we have one. We could get you one very easily.

Q. Was this picture upon the Bag Pipe package before it was assigned?

A. Before it was what?

Q. Before the brand was assigned to the Lorillard Company?

A. I think so.

Q. The picture of the two Highlanders?

A. I think so.

Q. Practically as it is there?

A. We would probably have perfected it a little more, changed it somewhat.

Q. A little refinement of printing and drawing, but the picture substantially as it was on the package before?

A. Yes, sir.

Q. You named the Comet, Pioneer and Yacht Club brands as being brands that you took from that long list, Exhibit D. 35?

DEFENDANT'S PROOFS.

A. Yes, sir.

Q. These are brands now made by the Lorillard Company?

A. Yes, sir.

Q. Who made Comet before the Lorillard Company made it, any one?

10 A. That was a brand that was turned over to us by the American Tobacco Company. Just who made it and when it was made I don't recall.

Q. But they marketed it?

A. They marketed it.

Q. The American Tobacco Company?

A. Yes, sir.

Q. We didn't have a sample of that Comet here, did we?

A. No, sir; there is not a sample here that I recall.
20 That is a cut plug today.

Q. What was scrap tobacco originally, Mr. Ball? It got the name, I suppose, originally from being made of scraps?

A. Scrap is rather a misnomer in the tobacco business. The cuttings from cigars are referred to by the cigar makers many times as cigar scraps, and the early days to find a market for that product that was too small to use to wrap up a cigar or a binder, they put it in packages, paper packages, and called it cigar clippings or cigar
30 scraps.

Q. That was the origin?

A. I imagine it was; I haven't studied up on that particular point.

Q. I presume the sale of tobacco, called scrap now, is so great there would not be enough scrap to make it up?

A. Oh, yes, there is lots of straight tobacco bought to manufacture these big brands of chewing tobacco.

Q. Do you use any of that scraps in the Beech-Nut
40 scrap?

DAVID H. BALL—CROSS.

A. Clippings?

Q. Clippings

A. I think we use some of it, although I am not as well posted on the contents of the packages as some of our other folks, who have charge of that end of the business.

Q. You may have some idea as to the proportion of 10
clippings or scrap and of original new tobacco?

A. No, I have not.

Q. None at all?

A. No, sir; couldn't give you any idea.

Q. You made a statement that at the present time the name Lorillard is on all of the Lorillard brands, I think.

A. Did I say that?

Q. Well, I am asking you. I think you did.

A. If I said that I was in error, because some of these 20
brands that were taken over by the American Tobacco Company did not bear any name, and we have not put our name on—such as in the case of Honest.

Q. That is a contemporary package right there?

A. Yes. We haven't put our name on that.

Q. That is Honest Scrap, the name Lorillard is not on it today (indicating)?

A. No, sir; they never have—there never has been, to my knowledge, a name on Honest Scrap tobacco. We 30
haven't any hard and fast rule to go by of putting the name on the package. It has been, as I say, the custom was, up to the time of the dissolution, to leave it off, but since that time it has been put on and generally on all of our brands that we have revamped or new brands that we might put out.

Q. The name of the brand, I imagine, is the important thing about it?

A. Yes, we put a great deal of stress on the fact that the Lorillard Company has been in business since 1760, 40

DEFENDANT'S PROOFS.

in fact, we got out a brand called "1760" and when we sample a man we impress that upon him in most instances.

Q. Can you name any other brands than you have mentioned that the Lorillard Company is putting out today without the name Lorillard on the package?

10 A. I believe this brand of Comet, I am not quite sure; it looks as though we didn't put it on the brand of Bag Pipe.

Q. Can you remember any more?

A. No, I don't know that I can.

Q. But I suppose there are a great many of these brands that you would be unable to say one way or the other about, whether or not it was on, aren't there?

A. There would be quite a few.

Q. You would be unable to say?

A. Yes, that is right.

20 Q. Whether or not it was on in the case of a great many?

A. Yes.

Q. Mr. Ball, you stated that you, I think I have you right, that you didn't know of any food company manufacturing tobacco products, was that your statement?

A. Yes, sir.

30 Q. Do you know of any food company, by food company meaning dealer in food products, groceries or what-not, who puts out tobacco under his own name, whether manufactured by himself or not?

A. What do you term a food company?

Q. Wholesale grocery.

A. Wholesale grocery?

Q. Yes.

A. Oh, yes; there are wholesale grocers that have their own brands. That was quite customary twenty-five years ago, but that custom has gone out of practice largely; there are very few today. There may be some.

Q. Do you remember any?

40 A. No, I don't recall any at the present time offhand.

BENJAMIN LLOYD BELT—DIRECT.

Q. Is it usual for a tobacco manufacturing company to manufacture goods and put the brand of the purchaser on them?

A. Well, we don't do it. The large manufacturers as a class I don't think indulge in that business.

Q. You mean that the Lorillard Company does not manufacture tobacco products and put on those products the brand of a purchaser? 10

A. No, sir.

Q. There are tobacco companies that do that, are there not?

A. I think Scotton & Dillon make some private brands, but whether or not they put the name of the purchaser on I couldn't say; they may and they may not.

Q. Did the Lorillard Company ever make for anybody tobacco products and put on those products the brand requested by the purchaser? 20

A. They may have in the early days. As I say, that was quite customary twenty-five years ago, but when the American Tobacco Company came into the business they discouraged it and worked their own brands so aggressively it practically absorbed all the business of what we call private brands.

Mr. Scott: That will be all.

BENJAMIN LLOYD BELT, called as a witness on behalf of the defendant, being first duly sworn, testified as follows: 30

Direct examination by Mr. Cavanagh.

Q. Your name is Benjamin L. Belt, you are of legal age, you reside at Lakewood, New Jersey, and you are Vice-President of P. Lorillard Company, is that correct?

A. Yes, sir.

Q. And what are your duties with the P. Lorillard Company, Mr. Belt, of what departments have you charge, or what part of the business? 40

DEFENDANT'S PROOFS.

10 A. At the present time I am co-manager in the sales department of the business, with the exception of cigars and little cigars. In 1922, the smoking and plug and scrap tobaccos and the cigarette brands of P. Lorillard Company were combined from a selling standpoint. The department of smoking, and so forth, as referred to by Mr. Ball, and my own department of cigarettes was combined on January 1, 1922, and I am jointly interested in the marketing of all the products with the exception of the big cigars and little cigars.

Q. How long have you been connected with the Lorillard Company as Vice-President?

A. Since December 1, 1911.

Q. And from December 1, 1911, until January 1, 1922, am I to understand that you had charge of the cigarette department of the Lorillard Company?

20 A. Absolutely.

Q. And from 1922, to the present time, you have been jointly in charge with Mr. Ball, another Vice-President, of the entire sales—

A. In directing the sales of all the brands combined, with the exception of big cigars and little cigars.

Q. Now, Mr. Belt, can you name some of the prominent cigarette brands of the P. Lorillard Company?

30 A. Egyptian Deities, Murads, Moguls, Turkish Trophy, London Life—you say prominent or all brands—Luxury; we have some business on that.

Q. What domestic brands?

A. Those are what we designate as all Turkish cigarettes, and in the blended cigarettes we have some business on Nebo, Zira and Cloudland, and Beech-Nut. I think those are the principal brands that we manufacture, that is about all of them.

40 Q. And from 1911, when you became Vice-President of the Lorillard Company, up to the present time, you personally have been in active contact and active charge

BENJAMIN LLOYD BELT—DIRECT.

of the sales of those cigarettes, of the various cigarettes of the Lorillard Company?

A. Yes, sir; sharing that charge with Mr. Ball for the last two years.

Q. Or since 1922?

A. Since 1922, beginning of 1922.

Q. Now, Mr. Belt, will you tell us how long you have been in the tobacco business, and give us a brief history of your connection with it right from the very beginning?

A. I have been in the tobacco business practically all my life. I was born on a farm, raised tobacco, seeded it, transplanted small plants into the field and kept them cultivated and cured, and graded tobacco and carried it to market. Later I traveled through the South extensively in selling what was known at that time as the old Virginia flat plug tobacco, and subsequently I was engaged in leaf, and had some business in export, made some foreign trips in behalf of the promoting of the exportation of Virginia and North Carolina leaf tobacco, and following that, in the year 1899, I was employed by the American Tobacco Company, which connection I continued until the disintegration of that company in 1911, and my elevation to the position I now occupy of Vice-President of the P. Lorillard Company, continuously in the business and actively in the selling end for the past twenty-four years.

Q. While you were in the American Tobacco Company, which I understand was from 1899 to 1911, what were your duties and of what did you have charge and what did you do?

A. Well—

Q. What was your experience with the American Tobacco Company?

A. My first duties with the American Tobacco Company of any moment, after a few months of sort of introductory work, I was sent to Bermuda to make a sale of some cigarettes of their ownership, purchase, made

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by some company they had recently acquired, the Union Tobacco Company, I think it was. I was instructed to attempt to dispose of those cigarettes in the market there, and also charged with the request to ascertain as much as I could relative to the general character of tobacco used then—from where it was obtained, from what country it was imported, the style of packing, and so forth and so on.

Upon my return—that trip lasted ninety days, probably, started out about the 1st of January, 1900, a few months after my employment, then I was put in charge of what was known as the Bright Long Cut, fine cut and German smoking tobaccos of the American Tobacco Company. That position I continued for about a year, as I recall, a little longer, and then I was put in charge of Perfection cigarettes, a brand known as Perfection cigarettes. I was given that brand exclusively, and made a little department, was told mainly for the purpose of beginning to absorb the knowledge and the experience of cigarette salesmanship, and that position I continued about another year, when the American Tobacco Company had formed the American Cigar Company, and decided to exploit extensively the cigar business, the principal brand being Cubanola, and the American Tobacco Company transferred me to the American Cigar Company and put me in charge of the marketing of the brand of Cubanola, a campaign that was conducted from the City of Philadelphia, involving that particular city and nearby sections of Pennsylvania, a very extensive and large financial campaign, employing 100 or more salesmen, and so forth. In the following spring, that was about September or October, it was decided to merge the American Cigar Company's selling end of their business into the Continental Tobacco Company, a company in which the American was interested. When this absorption was made of the American cigar business by the Continental I was put in charge, general supervisor or manager of the selling end, both from the New York office and the field of about

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seventeen states, having authority to direct which brands we would work—or, as we term it, which we would call “leaders.” If you were in charge of one state I might direct you to make a special effort on this, that or the other brand, which might be under the supervision of various departments, several different departments in the New York office. I had the authority to do that, to employ men, promote men, increase salaries or cause the dismissal of men, and that position I continued for about a year; and then I was made co-manager of the cigarette departments, the little one I had had previously, and the general business were combined, and I was made co-manager of that department. There were two department managers in each of the principal departments of the company. 10

Q. That is the American Tobacco Company?

A. The American Tobacco Company. I was made one of the managers of the cigarette business, which as I recall it was in 1903, and I continued in the cigarette department with different co-managers, several changes took place but I kept on, and it broadened out into about five or six departments, of which I became general head, of all the departments of cigarettes. That lasted up to the disintegration; I was in that position when the disintegration took place in 1911. 20

Q. During the time particularly that you were connected with the American Tobacco Company in charge of their cigarette department, did you supervise the get-up and bring out any famous brands of cigarettes or take part in any campaign? 30

A. Quite a number, several.

Q. Name some of them.

A. Both got up some and some I revamped or promoted that we purchased or acquired, acquired through the purchase of the American Tobacco Company of their business. For instance, the brand of Fatima cigarettes, 40

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which is quite famous, was created by the Cameron & Cameron Company of Richmond, Virginia, and that company was purchased by the American Tobacco Company, and the brand of Fatimas, along with a number of other brands, was put on my desk with instructions to look them over, and so forth, and we decided to make some little effort on the brand of Fatima, being about the only one we saw much future to. In the course of a few years I had caused that brand to be built up to quite a large volume, something like a billion cigarettes a year, in 1910, 1911. A billion cigarettes at that time, particularly of that type cigarette, relatively speaking, represented a tremendous business. The whole cigarette business then was about eight billions; today it is perhaps approximately sixty billion; so a billion of Fatimas in two or three years was, we thought, a good many Fatimas; and I put out the brand of Piedmonts, that had grown from nothing in a few years up to about eleven hundred million, as I recall it. I also put out the brand of Meccas, and Hassen. They both were large brands of 1910, being somewhere around five or six years old. It all took place between 1903, or really, I didn't become active until 1904, because I was away from the fall of 1903, until July of 1904, on leave of absence, on account of ill health, so between 1904 and 1911, these brands had been conceived or revamped and built up into considerable volume.

30 Q. These specimen packages represent the Fatima and the Piedmont (indicating)?

A. And the Piedmont.

Q. Those are today well known tobacco brands of Liggett & Meyers?

A. They are large and prominent brands.

Q. Since you have been with the Lorillard Company as Vice-President, beginning in 1911, December, have you had charge of the bringing out, or have you been instrumental in bringing out any cigarette brands, and if so, 40 will you name them?

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A. Several. Immediately, early in 1912, we brought out a brand called Zira, I think that was the first one, and Nebo. They were right within a very short period, I am under the impression, without having made reference to it, the first to be brought on the market was the Zira—both perhaps before the middle of 1912, were on the market, and since that time other brands were brought out, both in what we call the blended cigarette, and in the all-Turkish cigarette, London Life in all-Turkish, Coat of Arms, Zubelda in the blended cigarette, I recall are other brands having brought out. 10

Q. Did you have anything to do with the bringing out of the Beech-Nut cigarette?

A. I did.

Q. Will you please first relate briefly how you came to bring out this Beech-Nut cigarette, like the package I show you, and which has been frequently referred to in this case as the Lorillard Beech-Nut cigarette? Just give us the history first briefly of how you happened to bring that out. 20

A. We had not been very successful in holding the volume on Nebo or Zira cigarettes. We had, however, in a very short time relatively been successful in getting them up to quite a conspicuous volume, but for some reason they did not stick, didn't last, and we found ourselves about in a position of no blended cigarette business of any consequence, our entire cigarette business being on the higher priced all-Turkish brands. 30

Q. Right there. The Lorillard Company practically controls the Turkish cigarette business, the great volume of it, doesn't it?

A. Our brands represent a majority volume, major portion of the Turkish cigarettes that are in existence.

Q. Now continue your answer.

A. But we were not satisfied to confine ourselves to all-Turkish, as we estimated a larger and more growing business on the other type of cigarette. So we were con- 40

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sidering for a long time putting on the market another brand of cigarettes of a blended type and were about ready to do it a year or two sooner than we did, it being deferred on account of the war, and the great inability to get tinfoil and wrapping material and so forth. Well, we dragged it along, so to speak, and did not actually get the cigarette in question, Beech-Nut, on the market until in the spring of 1921. As I recall the opening campaign was started in the City of Boston just the day following Washington's Birthday, in the year 1921. Prior to that time, of course, we had created the brand of Beech-Nut in its present state.

Q. What did you have to do with the getting up of this package, that is, the design and the ornamentation? Did that come under your supervision?

A. I directed it.

20 Q. How did you happen to take the name Beech-Nut for the cigarette?

A. Because we owned the brand of Beech-Nut tobacco which was a very large seller, having at that time, as I recall, reached something like 30,000,000 of pounds—25 or 30,000,000 of pounds. It seemed very popular. The compliments that were bestowed upon it, its quality, merit and so forth, it had made many friends with the consumer, and I felt inclined to adopt it as the cigarette name, feeling security in the title which we had—we often had gotten brands and had some trouble much later, causing loss and so forth. But I felt that we were absolutely secure in that as we had been marketing it for five years or six years, and another factor that quite influenced me was the fact that one of our competitors, the American Tobacco Company had in the interim during this period of considering gotten out a blended cigarette, offered on the market a brand of cigarettes called Lucky Strike, and Lucky Strike cigarettes were derived in name from Lucky Strike tobacco that had been on the market

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for a very long time, perhaps twenty-five years, and had likewise built up a good reputation, had a good following. And that had a good deal to do with convincing me of the propriety, not of the legality, of our taking Beech-Nut, but of the propriety of taking it. That brand had gone out from a smoking brand as a base, to use as a cigarette with marked success. Then after conferring with our President, Mr. Ball, and perhaps others in the company of sufficient capacity, we determined then that we would make our fight, or we would select the brand Beech-Nut, and get up the package and undertake to secure our share, or as large a share as we could possibly obtain of that brand as a blended cigarette. And then I started the machinery to create a package. 10

Q. How did you happen to select a red color for this package?

A. Well, it has always been my idea and policy to obtain as great an amount of individuality as possible in our cigarette merchandise, and being quite familiar with the cigarette field, the principal brands in existence, that we would become competitors of, that were established and all of pronounced colors—Fatima— 20

Q. Will you produce some of the brands to which you refer and just briefly mention them in your answer?

A. Fatima being buff or yellow package like this, and Camels, which was then on the market and a very big seller, being a more or less similar package in color, buff with brown trimmings, Omars being a delicate baby blue and Piedmonts being white and Chesterfields being likewise white, Lucky Strikes being dark green and Salisburys brown or green, or very similar color. It really left me, by preference, however, I would say, about the only color of what we call the representative colors, of red; and the brand of Pall Mall cigarettes, a high priced Turkish cigarette, in a box, so entirely distinct, but of a red color had been very popular and I had heard many 30 40

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compliments of the color scheme of the Pall Malls being appreciated; so then I decided that to keep away from these brands in appearances, and to get something that was entirely distinct, that I would take a red color and promote that scheme, and in getting out a package we kind of adhered to the same general type of red that was already more or less in evidence in the Beech-Nut radiating red shoots or lightning scrolls. So we have about the same red in the Beech-Nut cigarette package as we have in the Beech-Nut chewing package, and in my anxiety to excell, if possible, in the appearance of my package to create the approval of the consumer, I went a little farther than any of these packages had gone, some of which I had created and some not, in taking what I call the border off of my Murad package, on this package, it being a very high class Turkish cigarette of large volume—there is a kind of Mosaic tile effect border, and I felt that I could take that, part of that, and use that with that color scheme in bordering the Beech-Nut which would give it more tone and class and appearance than I felt that these other brands, in a sense had, and that it would lend itself more to the eye of the consumer by having that character of border. So that is where we got the border. We took it from our own brand, and we did not think that it being so different, one a box selling at 15 cents for ten and the other a package to sell at 15 cents for 20, that there would be any question of mixing up or reflecting in any way on Murads by doing that. So that is about in the rough the way we come to get the red package.

Q. Now, as to the shape or form of this package, it is quite common in the trade and is known as a cup package, is it not, the general package?

A. Cup package.

Q. As distinguished from the box package?

A. That used to be open at the bottom, and the old-fashioned cigarette was put up with the foil around, and

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sort of half stuck here, either end would open, and they would fall out. So way back in the American days, I put the bottom on the Fatima package to change it from its open end package making it cup because it had a bottom that would hold, and it has since then been known pretty generally as the cup package. That is the way that originated.

Q. Now, as to the transparent or glazine wrapper, about the Beech-Nut package, will you tell us how you happened to put that on?

A. As a protection of the brand, as an impressive medium to the consumer of care and guarding the contents from exposure from which all tobacco suffers from too much moisture or too much dryness—suffers, perishes, loses its flavor and charm and so forth. So some years prior to this I had originated an idea to take our Egyptian Deities and wrap it in this paraffin paper, which presumably excludes the air and the contents would retain their natural moisture, just like it came from the machine.

Q. Were you the man in the tobacco business who got up the idea of wrapping packages?

A. I put that around Egyptian Deities and it was immediately seized upon by our competitors and we were unable to stop them because we had no patent on that way of doing it. Then we put it around this package on the same principle, to give it tone and class and appearances and protect the contents from too much moisture or too much dryness, and the belief in my mind was that it made you feel that it was particularly good and classy. I did not originate the thought, I applied it. I was lunching one day in a prominent New York restaurant, and I found a roll served to me in a little paraffin sack, and it impressed me as being very acceptable because the waiter did not have to handle the bread. I immediately went to work, put that sack in my pocket, and went to work applying it to cigarettes. It is an applied idea, not an originated one.

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Q. Now, you spoke of this glazine scheme being adopted by your competitors. Do you know of any brands of cigarettes on the market today, other than the Beech-Nut which have the glazine put around them?

A. Yes, I think the Melachrino cigarettes use that wrapper.

10 Q. Have you any there which show the use of the wrapper?

A. I have not looked at these. The Salisbury has it. That is the American Tobacco Company's manufacture. Displayed again by Chesterfield, Liggett & Myers manufacture; Omar, American Tobacco Company, and Lucky Strikes, and two, four, five packages in my hand, and Sweet Caporals making six, all coming from that same channel and generally used.

20 Q. Now, turning to this Beech-Nut package how did you come to adopt the oval and the picture of the twin beechnuts on it?

A. I took it from the Beech-Nut package that we owned in principle, leaving off the 1760 established, which appears on this package, and applied it to the cigarette package as coming from that package. But I have, in my experience in getting out other brands used the oval, many years ago, before the present Lorillard Company was in existence, I put out packages with the oval on.

30 Q. What was the name of that package?

A. Twelfth Night was one, I recall.

Q. Now, in connection with this Beech-Nut package something has been said in here about the use of the word "quality" on the package. How did you come to put the expression, "perfect quality" on the Beech-Nut package that you did?

A. Well, we believed that the contents of the package warranted the use of the phraseology, and it wasn't new to us, the word "quality" on cigarettes. I was looking at the package recently of Piedmonts, and I found there,

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"Cigarettes of quality." Pardon the reference, but I wrote that in there years ago when I was with the American Tobacco Company, on a piece of advertising matter and my superior officer was so impressed with it that he had it transferred to the package.

Q. To the Piedmont package?

A. To the Piedmont package. It was on a piece originally of window display, and I put on there "Cigarettes of Quality," because they were particularly good then, and our executive officer had it transferred and ordered the use of it on the package, on the theory, he said, that the phrase was right before the consumer all the time he held the package. 10

Q. So it is a common thing to use the word "Quality"?

A. Very frequently used and misused.

Q. Now, Mr. Belt, when you started your campaign with this cigarette in 1921—as I understand—what procedure did you use—what method did you use in introducing it to the trade? 20

A. We had shipped the goods to the jobber at Boston.

Q. That is where you started the campaign?

A. Practically confined the campaign to the immediate future, or for the time, to the City of Boston, and the very nearby towns like Lynn and Lowell, if you are familiar with the locality, they are so near that they interchange trade, and you have to incorporate those so that the jobbers may take care of the trade. We canvassed the retail trade and offered the jobbers' salesmen with the consent of the jobber, 25 cents a thousand for a period of 60 days or 90 days—60, I think, perhaps, that for every thousand Beech-Nut cigarettes that they would sell and cause to be delivered to the retail trade, to enable us to get a quick and interested distribution of the brand, and then I put in that section about 40 retail salesmen or missionary men whose duty it was to canvass these stores, street for street and block for block and obtain a sale, if possible, of one or more cartons, or one or more 30 40

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10 thousand of Beech-Nut cigarettes with every retailer, and in a very short time the cigarette was well distributed. They had advertising matter, as I recall, the poster on the far side to the right was the one that we used in posting on the windows of the stores, the top cream colored poster, practically the center, advertising these cigarettes, and then we sampled and we a little later reproduced something similar to that poster on what is known as bill boards, this large 24 sheets, and then a little bit later, I got the first cigarette ad I have ever seen on the front pages of the Boston papers, not a very large ad but on the front page. Generally, they always had to go back inside, but I was able to get the papers to accept a Beech-Nut ad presented on the front page, and that, of course, gave it very quick and prominent publicity.

20 Q. Just read this. Does this Defendant's Cross Exhibit No. 5 illustrate the ad that you had put on the front pages of the papers?

A. Yes, that is the thing.

Q. And that ad has the word "Lorillard" on it?

A. Yes, Beech-Nut, made by P. Lorillard Company, and we pursued those methods. I only roughly state them, with much energy and effort, and distribution was quickly obtained and the brand began to sell right away.

30 Q. In addition to your missionary crew of 40 men, did you use your regular salesmen in pushing the brand?

A. Well, those were our salesmen assigned to this brand. We had, as I recall, about forty men in the City of Boston. That was, we felt a sufficient number for Boston and the nearby towns. Our other employes of the Lorillard Company continued to feature their regular business, like Planet tobacco, or various other merchandise.

Q. But you made up a special crew to take the Beech-Nut territory?

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A. We sent salesmen with a head man assigned to Beech-Nut and nothing else. Then an assistant and corps of salesmen and advertisers who devoted their exclusive time to the Beech-Nut cigarette.

Q. Did you have any intention or purpose of trying to sell this Beech-Nut cigarette or market it on the reputation of the Beech-Nut Packing Company?

10

A. Not the slightest in the world. As foreign to my mind, as it would be to commit a crime right here or murder somebody.

Q. When you were getting up the package, did you have such an idea?

A. Not the slightest on earth. We took what we thought belonged to us, and adapted it to suit our package as we have done on many occasions.

Q. Now, how did the Beech-Nut cigarette sell when you first put it on the market?

20

A. Very well, indeed. As well, perhaps, as any cigarette I have ever been associated with in marketing, maybe a little quicker at the beginning.

Q. Were you ever associated with the introduction of a cigarette which had a large sale at the beginning as the Beech-Nut along the same line?

A. Yes, several brands I had put out previously had a rapid sale, but maybe not the first week or ten days did they start going as quickly. But in a period of 30 days or 60 days, they had run the same momentum.

30

Q. Can you name some of them?

A. Yes, I put the brand of Meccas and Hassans on the market. They both got into a considerable volume in a reasonable time. We got such a sale on Hassans to such an extent that we had to cancel the orders. That was a cork tip and we could not get the machines to put on the cork, and we could not get the cork to put in the machine. We imported it from Spain. That was really what caused us to put out Mecca, which was on the same principle with the exception it was not a cork tip. That

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10 went right along. That is how it came upon the market. That was in the old days, prior to the present Lorillard Company's existence. When we put out Zira and Nebo cigarettes, to which I referred, in 1912, they both ran into tremendous volume in a very short period of time, and as I recall those cigarettes before the end of 1912, had reached approximately seventy-five to one hundred mil-

10 lions a month, which back in 1912, was a lot of cigarettes. Q. Proportionately it was larger than Beech-Nut or as large?

20 A. Well, I haven't referred to those figures. I intended to do it, but overlooked it. I am under the impression that we sold as many of Zira or Nebo separately within the same fiscal period as we did of Beech-Nut approximately. I am not absolutely certain of the details, but in substance, as I recall, we put out about nine hundred and some odd millions of Beech-Nut in the year 1921, and I think that we sold something like that many of the other brands. I think so. Those figures, I must say, I am not positively accurate about.

Q. How are Beech-Nut cigarettes selling today?

A. Very poorly indeed.

Q. To what do you attribute the decline?

30 A. Well, primarily to the fact that our competitors, who have enormous volume of brands were selling to the consumer at the time we put Beech-Nut on the market at 20 cents a package.

Q. What cigarettes, for example?

40 A. Camels, Chesterfields, Lucky Strikes, Piedmonts, and there was quite a business on Sweet Caporals in some sections, and we came on the market in what has previously been referred to as what we thought was the psychological time to offer the public what we regarded as an equal cigarette in quality, and certainly in physical appearance to any cigarette on the market at 15 cents for the package. And it seemed to me to be a very happy response; in 1921, the whole country was recovering from

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the deflation and so-called panic and in tobacco merchandise, at least, everybody seemed to be looking for a little better bargain, and that was what we thought would be the psychological time to offer 20 cigarettes for 15 cents that we believed to be for smoking purposes, as acceptable and as good as 20 cigarettes of our competitors as represented by these several brands, Camels, Chesterfields, Piedmonts, and Lucky Strikes, which were being sold for 20 cents for 20, and we sailed along splendidly with the merit and quality of the Beech-Nut cigarette until in the late fall of 1921 when they tilted the prices a little bit, and by and by those big brands that were so powerful that they could command the situation got down not only to the price that we had expected to sell Beech-Nuts to the consumer, but got cheaper, and it was not an infrequent thing to find Camel cigarettes offered at two for a quarter, and Beech-Nut being unable to force its position by lack of its volume, 15 cents, and the big brands were really cheaper and it just took the living life out of Beech-Nut and cut them down from nine hundred million—on that basis a billion a year, and not the whole country covered at once, mind you—we begun in New England and worked across the country, and had about covered the United States at the time these other brands became cheaper.

Q. You had a cut price war, did you not?

A. We begun and went into the most pronounced cut price war that I have ever observed in my entire tobacco experience, and the more they cut, and the more general that cut got to be—until every little hamlet and country store and everything was selling these goods at 15 cents and two for a quarter, and some exceptions, it may have been 16 or 17 cents, but the great volume of the business was down to the same or lesser price than our brand had been, and we suffered tremendously and quickly and our volume today on this brand is represented by approximately five or six millions a month—six or seven—be-

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Mr. Cavanagh: Turkish Trophy package is offered in evidence and marked D. 42.

(Package marked D. 42.)

Mr. Cavanagh: The London Life package is offered in evidence and marked D. 43.

(Package marked D. 43 in evidence.)

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Mr. Cavanagh: And the Windsor Castle Fag package is offered in evidence and marked D. 44.

(Package marked D. 44 in evidence.)

Q All those four packages last referred to as exhibits were on the market prior to your adopting the red background for the Beech-Nut?

A. Yes, sir.

20

Q. This morning in your testimony you also spoke of the rapid growth of Nebo cigarettes and Zira cigarettes, which I understand were put out under your supervision.

A. Yes, sir.

Q. If necessary can you produce the yearly figures from 1912, say, showing the growth of these cigarettes?

A. I think so; I think I have it; I have prepared it, I I didn't this morning, it has been prepared.

30

Q. Now, Mr. Belt, in connection with your designing of the Beech-Nut pouch or cup for the Beech-Nut cigarettes and its connection or outgrowth, as you have testified, from the Beech-Nut Scrap Tobacco package, which I will call it, I would like to read you from a letter, which is part of Defendant's Exhibit D. 18 in this case, which is correspondence between the Beech-Nut Packing Company and P. Lorillard Company. This letter says:

Mr. Gifford: Give the date.

Mr. Cavanagh: It is page 25 of that correspondence.

Mr. Gifford: Give the date.

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Mr. Cavanagh: Dated August 7, 1919. "In discussing the situation"—this is to P. Lorillard Company from the Beech-Nut Packing Company, and it reads as follows:

"P. Lorillard Company,
119 West 40th Street, New York City.

Dear Sirs:—

Mr. Thomas J. Maloney.

"Our president, Mr. Arkell, was here yesterday and your letter of July 28th was presented at a meeting of our Executive Committee.

"In discussing the situation, a suggestion was made which possibly has not occurred to you, and therefore we are submitting it to you for your consideration. In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut scrap tobacco package in a wrapping for your cigarettes; in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained through the merchandising of that product. Our thought in regard to the above is prompted by the procedure of the Patterson Co. in connection with their Lucky Strike Smoking Tobacco and Lucky Strike Cigarettes.

"Should you not care to follow the suggestion offered above, we hope you will abandon the red background and change the same to blue or some other color, and we would like to see the words 'Beech-Nut Brand' a straight line instead of a curve, provided you could work out this idea to your satisfaction.

"Mr. Arkell has no recollection of hearing mentioned the advertising matter or wrappings you

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have provided for your Beech-Nut cigarettes, and while Mr. Lipe recollects some mention of it, no reference, as far as he can recall, was made in regard to quantity and neither of these gentlemen gained the inference that you would expect the Beech-Nut Packing Co. to absorb the cost of these supplies."

- 10 Now, I call your attention in particular to that portion of the letter referring to the adoption or to the suggested adoption for your cigarettes of the design or the substantial design of the Beech-Nut package. Did you, as a matter of fact, prior to the receipt of that letter, ever attempt or design a wrapper or package for your cigarette along the lines of the Beech-Nut scrap tobacco design on the package, and if so, can you produce the same?

A. We did.

- 20 Q. Just tell us what happened.

- A. We, I felt very much inclined to the same belief as expressed in that letter prior to its receipt, and I had ordered an experiment made in the reproduction of the Beech-Nut chewing tobacco package for a cigarette package, and this, as far as I can tell, is what was produced, but as soon as I got it down to this proportion, being so much smaller in area than a package of cigarettes, and being intended to reach an entirely different type of consumer, I immediately reached the conclusion that the
30 amount of proper class, as I will term it, and appeal, did not exist in this package, and I felt the necessity of looking further for an idea and explore that. Besides, in the consideration of the fact as related, I recalled the so-called sunburst effect, I believe it was popularly called around our place, the sunburst package—those words have been applied to it at least, I recall the sunburst effect to some degree at least and similarity of the old Sweet Caporal package, and in the desire to steer as far
40 as possible from any form of infringement or copy that

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we might even get by with legally, but be criticized in policy of having adopted it, it assisted me in forming the still further conclusion of an unfitness, and to that I will add another objection. Previous to that I had put on the market a brand of cigarettes called Zubelda, a brand of cigarettes intended to be considered as a more direct competitor to the Fatima cigarette than anything that was then in the market, and that package—I happen not to have one, it may be in the exhibit—I don't know—was distinctly of stripes, as I recall it, it was a bluish green stripe and another color, I forget what the other was, on a yellow background or a yellow strip, but I have had visions and nightmares, I might almost say, of the Zubelda striping, radiating yellow and green, and I did not want any more striped packages with the memory of the failure of Zubelda in my mind, and the fear of a criticism by my competitors, the American Tobacco Company, in the radiating lines that existed on the package of Sweet Caporal cigarettes, and therefore we didn't proceed farther in attempting to apply an exact reproduction of the tobacco package as a model and fashion of the style label for the cigarette package.

Q. And you had, as I understand your testimony, made this specimen design that you have produced along the lines of the Beech-Nut Scrap Tobacco prior to the receipt of that?

A. Oh, long, that was the first thing we had tried out.

Q. Did the Sunshine package of Liggett & Myers, do you know, have any rays on?

A. Yes, but at the time that we were considering this the Sunshine package, I don't think was in existence. I think it has rays, but it was put out prior to the—subsequent to this period, after this period. I think that came along probably a year, the previous year. I think it was put out in 1920, and this was considerably before that time.

DEFENDANT'S PROOFS.

Mr. Cavanagh: If your Honor please, we offer in evidence this specimen wrapper of the Beech-Nut cigarettes.

The Court: Admitted.

(Wrapper marked D. 45.)

10 Mr. Cavanagh: And also the package of Zuhelda cigarettes to which the witness has referred.
(Package marked Exhibit D. 46.)

Mr. Cavanagh: And I also offer in evidence the package of Sweet Caporal cigarettes.

(Package marked Exhibit D. 47.)

Q. Now, Mr. Belt, in your long experience in the tobacco business, have you ever heard of a tobacco company which manufactured any food products, confections?

A. I never have.

20 Q. Do you regard food products, from your experience in the tobacco business, do you regard food products and confections as being in the same class of goods?

A. By no means, entirely distinct.

Mr. Cavanagh: The direct examination is closed.
The witness is yours.

Cross examination by Mr. Scott.

30 Q. I think you said, Mr. Belt, that your principal Turkish brands are Helmar, Deities, Murad, Mogul, Trophies, and London Life; is that correct?

A. Yes, that is.

Q. Do they form a material part of the business of the Lorillard Company, an important part?

A. You mean of the cigarette business or the total business?

Q. Do the cigarettes I have named in the aggregate form an important part of the Lorillard business?

40 A. Yes, they represent a considerable volume of that business.

BENJAMIN LLOYD BELT—CROSS.

Q. One of the most important parts of the business?

A. Perhaps classified as a unit, as against any other one proposition, that is, I mean as against any one brand other than Beech-Nut tobacco, they may be better than any other one brand taken as a whole, collectively.

Q. How about Helmar cigarettes, is that a big seller?

A. Very good seller.

Q. How does that compare in importance with the others of the list I named?

A. Well, the Helmar is about the same volume as Murad, but not as profitable a brand. We haven't been able to make as much money on Helmars, because the selling price is hammered down to such a point which has left but a small margin of profit with highly increasing cost of the imported Turkish leaf. We sell about equal in volume, about equal, but Murad pays a better profit to the company.

Q. Are there any of the all-Turkish that sell in larger numbers than the Helmar and Murad?

A. No, those are among the largest brands.

Q. Did you have a box of the Helmars in your hand?

A. I haven't had the Helmar.

Q. I think I have one with me. This is a box of the Helmar cigarettes that you have referred to, is it not (indicating)?

A. Yes, that is a package of tens. There are packages of twenties, fifties and one hundreds.

Q. Does the name Lorillard appear on that package in any place?

A. Yes, "Capital stock owned by P. Lorillard Company," I think, if it is a modern package. "Capital stock," I am sorry to plead my poor eyes, "owned by P. Lorillard Company" under the name S. Anargyros.

Q. Where did you read that?

A. Underneath the signature "S. Anargyros."

Q. On the inside of the cover?

A. Of the package, yes.

DEFENDANT'S PROOFS.

Q. You read it, did you not, with some difficulty?

A. Poor eyes.

Q. The name that you read appears in white letters upon the black scroll or flourish appearing under the name Anargyros?

10 A. No, that is a straight line, the—under Anargyros there is the corporation inscribed in the scroll, but the capital stock owned by P. Lorillard Company is in a separate and distinct line under the scroll, and very legible in most. That is a bad print. Most of them are very clear.

Q. The place where you have read the words "Capital stock owned by P. Lorillard Company," being on the inside of the package of the Helmar box, inside of the cover?

A. Yes.

20 Q. That is the only place, is it not, where the name Lorillard appears upon this Helmar box, that is right?

A. I think so.

Q. So that from the exterior of the box when sealed according to the Government regulation with a Revenue stamp, there is no place where the name Lorillard would be visible?

A. It is not visible as applied to the package on its exterior.

30 Q. Not in any place?

A. Not in any place.

Mr. Scott: I would like this marked for identification, to be offered later as plaintiff's exhibit.

Mr. Milton: Mark it in evidence, if you like.

Mr. Scott: All right, I offer that as Plaintiff's Exhibit P. 43.

(Package marked Exhibit P. 43.)

The Witness: I would like—am I permitted to make a statement?

BENJAMIN LLOYD BELT—CROSS.

Mr. Scott: You may.

The Witness: I don't know what the law is but the reason, Mr. Scott, that the "Capital stock owned by P. Lorillard Company," appears as it does, is due to the fact that those brands were gotten out under the name of S. Anargyros when S. Anargyros was a corporation owned by the American Tobacco Company before its disintegration, and it was transferred or made a part of the assets of the new Lorillard Company *in toto*, all the stock, physical assets, and so forth, came over, and the American Tobacco Company had been marketing the brand as S. Anargyros, but reasons developed that made it necessary to S. Anargyros, who was then operating as a corporation, but who was not known as a corporation and we applied the corporation and the capital stock owned by P. Lorillard to prevent the public from believing or possibly getting the impression that S. Anargyros was an individual and was offering cigarettes on his individual merit, and we put corporation on there to apprise the public of the fact S. Anargyros was a corporation, and as an individual might be dead or might be alive, might be in this country or might be in Greece, and we put the capital stock owned by P. Lorillard Company so as to show that all of that corporation was the property of the P. Lorillard Company and was not run as an independent separate corporation but to apprise the public of the fact that the capital stock belongs to the P. Lorillard Company, that S. Anargyros is a corporation and not an individual, and we did not think it would be judicious to affix P. Lorillard on the outside of those packages, because they were transferred without it, or to change the appearance of them, and we did not make an original place for

DEFENDANT'S PROOFS.

it as we did not feel the necessity for doing so. It wasn't done and I think you will find that same thing applies to all the Anargyros brands owned by the Lorillard Company.

Q. The idea, as I understand you in short, was to have this information regarding the stock ownership conveyed?

10 A. As a legal proposition.

Q. In some part of the package but without at all interfering with the appearance of the exterior of the package? Is that right?

A. It was. The brand was in existence when that was decided to be applied. It had been on the market for some years.

Q. And I am right in my question?

A. Yes.

Q. You said that you thought that also applied, Mr. Belt, to the other brands?

20 A. I think it applies to all the Anargyros brands, Murad, Helmar, Deities, Moguls, Trophies—I think it is applicable to all of them.

Q. Your recollection, without verifying it—you may do that if you wish later—would be that the name Lorillard in this same way appears on all these brands you mention?

A. That is my recollection.

Q. You don't know whether it does or not.

30 A. I think so. I really think you will find that to be correct, although I am not absolutely certain.

Q. Have we a package of Deities in evidence? I will show you, Mr. Belt, a box of Deities, and you may examine it just to see whether your recollection was right.

A. It is on the front of this package, on the other it was on the inside, "Capital stock owned by P. Lorillard Company." I think it is on all the packages just under the name of S. Anargyros in every instance. On that package it appears on the outside.

40

BENJAMIN LLOYD BELT—CROSS.

Q. Very small type as compared with the Anargyros?

A. Yes. Put in after they had been running for years and could not be very well made larger.

Mr. Scott: If I may, I will also offer this as Plaintiff's Exhibit P. 44.

(Received and marked Exhibit P. 44.)

10

Q. Now, we will just run through some more of these. London Life was another one of these Turkish brands?

A. I believe I called that; I am not sure whether we transferred London Life to Lorillard. It has been a very inactive brand; I am not sure whether we retained it or not. I don't think it is on this one—yes, it is on the inside.

Q. It is on the inside of the London Life box in the same way as with the Helmar—I am correct?

20

A. Yes. Whether the S. Anargyros appears on the package, that is, when it appears solely on the inside it appears in that way; where it appears on the outside as in Deities it appears on that "S. Anargyros Corporation, capital stock of S. Anargyros owned by P. Lorillard Company."

Q. I think you stated toward the close of your examination that you did not know of any tobacco company making food products. How about the converse of that proposition; any food company marketing tobacco products under the food company's own brand?

30

A. As a manufacturer, I believe the question was raised of what we call a wholesale grocer; that exists sometimes, a wholesale grocer has his private brands of food products and his private brands of tobacco products and may be using the same name, but I don't know of any so-called tobacco manufacturer who manufactures any food products under any name, and consequently, I don't know of any prominent food products manufacturer

40

DEFENDANT'S PROOFS.

like the Beech-Nut Company being the manufacturer or who have intended to manufacture tobacco products.

10 Q. But you do know of wholesale grocers who put out cigars and cigarettes? A I think it was more or less in the old days, the custom of wholesale grocers to have the name that might apply to various merchandise, food stuffs, maybe some private brand. I am under the impression that Sprague, Warner & Company of Chicago had a brand made for them, Richelieu, I think is the name that is used on some food products, and also on some tobacco products. But this is a private controlled brand, not an open market brand.

Q. Private controlled brands of that kind are not unusual?

20 A. It is the property of Sprague Warner. I don't think the manufacturer, whoever it may be, makes it for anyone except Sprague Warner.

Q. That is not an unusual circumstance?

A. Not restricted to individual distributors, but as an open trademark, I don't know of it to my knowledge.

Q. Do you happen to know whether the firm of Park & Tilford in New York put out any cigars or cigarettes under their own private brand or under their own name?

30 A. Why, I think they are putting out a brand of cigars called Tilford. That is a controlled brand. Park & Tilford put out a cigar called Tilford.

Q. You don't understand that they manufacture it themselves?

A. Yes, I think they do. I think Park & Tilford manufactures Tilford cigars, a cigar that is called "Tilford."

Q. You think they have a cigar factory?

A. I think so. They did have, I am sure.

Q. Do they put out cigarettes, do you know under their own name?

40 A. I don't think so. I don't know of their putting out a cigarette.

BENJAMIN LLOYD BELT—CROSS.

Q. Do you know of any wholesale grocer who puts out cigarettes under his own name or his own brand?

A. I don't believe that I recall it, it has been once or twice my experience that we have given in the old days a controlled brand to a jobber, that is, he controlled it like Sprague and Warner did the Richelieu. I think I recall giving a firm of Stickney & Company, St. Louis, some years ago, a brand of cigarettes for which they had no competition, but I don't think we ever got a duplicate order. It has often resulted in similar efforts receiving no justification. 10

Q. You mean the Lorillard Company—

A. That was in the old days, in the days of the American Tobacco Company. We haven't done it, I don't think we have a so-called controlled brand—we manufactured a brand for Liggett Company—their property; we did the work for them, they sold it. 20

Q. Well, this instance you referred to in St. Louis. The American Tobacco Company made the cigarette and put the St. Louis Company's brand on, and the St. Louis Company took them and sold them.

A. Whether we put Stickney & Company's name on, I am not clear. It has been 15 years ago, but it is a clearly established fact that brands like that have never existed to any extent.

Q. The tobacco company manufacturers or many of them do manufacture when requested to do so, brands for customers, do they not? 30

A. Well, it may be possible that some do, we don't. I don't recall that we are making anything except this brand for the Liggett Company. We have made a brand or two but it is so infinitesimal.

Q. Of cigarettes or cigars?

A. No, cigarettes. I am not posted about the cigar end of our business much, but I think there are very few brands of cigarettes in existence other than the open 40

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trademark brands of the principal manufacturers, perhaps the percentage would represent less than nothing.

Q. Does the Liggett chain of drug stores have a brand of cigarettes?

A. Yes, I spoke of them. Black and White.

Q. You make them?

10 A. They have a brand that we manufacture for them. They own the brand.

Q. The Lorillard Company makes them?

A. We simply make it. They guarantee the wrapping material in case it is discontinued to reimburse us. We manufacture the brand, a certain grade, and deliver them to them at a price. That is all our connection with them. It is their property, the trademark rights of the Black and White lies with them. I spoke of that just before.

20 Q. In your direct testimony you spoke of offering special inducements to the salesmen who introduced the Beech-Nut cigarettes?

A. Salesmen of jobbers, or to the jobber, I believe, we made it; it, in the main, I think, reached the salesmen of jobbers.

Q. Salesmen who come in direct contact with the retailer?

A. Yes, sir.

30 Q. Were they any special instructions issued by the Lorillard Company that were directed to or intended to reach the salesman who came in contact with the retailers?

A. Well, only through the house we sent a circular, matter of record, we sent a circular to all of our customers in that section saying that we would pay an extra compensation of 25 cents per thousand on the sales of Beech-Nut in a fixed time, say two months, and the jobbers, most generally, almost without exception, unless it be some little fellow who did his own selling, they, as I understood it, extended that offer to their selling organization and the point was, it was maiden territory, you understand, and 40 the goods were at that time sold at the price the manu-

BENJAMIN LLOYD BELT—CROSS.

facturer had hoped would prevail which gave the jobber a very radical profit and the 25 cents additional went to the salesmen, and a good big effort was made to get in quick and get the distribution. That is why I made the offer. We were able to accomplish more distribution and enthusiasm and co-operation with that 25 cents than we could buy without jobber salesmen with a dozen quarters to the thousand. It would probably cost us three or four dollars a thousand to do it straight from the shoulder with our forty men, as against the combined selling power of all the jobbers. 10

Q. During this publicity campaign for the introduction of the Beech-Nut cigarettes, did it come to your knowledge at any time that the Beech-Nut cigarettes were being mistaken for a product of the Beech-Nut Packing Company?

A. Do you mean thought to be a package of gum or a package of something else? 20

Q. No, thought to be a product of the Beech-Nut Packing Company?

A. I cannot say that I recall directly. There was some discussion of it at different times. I think I met with some instances myself where something relative to that or in reference to that was mentioned. There seemed to be curiosity expressed by some dealers that I might visit or retailers who were familiar with the name Beech-Nut in gum, perhaps and were not at that time, much familiar with it in tobacco products because the brand of Beech-Nut tobacco had practically never reached at that time beyond a very extremely limited way in a distribution in New England and particularly in Boston, and I felt constrained to believe that, because, as we came further west, with the Beech-Nut cigarette there was practically no discussion of it as compared with at first, when we covered the area that had been covered by Beech-Nut. But these remarks that may have been made of whatever nature they were were at the immediate moment, so to speak, when the brand was put out, but it passed almost like vapor. 30 40

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It did not linger. They quickly appreciated the fact that Lorillard was the manufacturer of Beech-Nut cigarettes. It was stamped on the package and pretty clearly admitted on the face of the package. I do recall that salesmen at different times might make some reference to the usual chat between retailers and themselves. There
10 might have been some reference in some way, what I would call sort of careless conversation.

Q. Did you ever issue any instructions to or designed to reach the salesmen who came in contact with the retailer?

A. When that information came—

Q. Instructing such salesman to take precautions against the Lorillard Beech-Nut cigarette being mistaken for a product of the Beech-Nut Packing Company?

A. Any time there was any discussion by the salesmen, I gave the men in charge of crews and channels
20 down orders to make it very clear that we had intended to do that, and pointed out that we put the name "P. Lorillard" on the package to identify it very clearly as a Lorillard product, and that we did not wish anyone to be under the wrong impression regarding it, and therefore to please make it very clear that Beech-Nut cigarettes and Beech-Nut tobacco were manufactured by the P. Lorillard Company.

Q. The substance then of this communication, however conveyed, was that the salesmen were to take special precautions to make it clear that they were not made by
30 the Beech-Nut Packing Company?

A. Well, they were to meet any careless remark with the proper information on the subject. As far as making any special precaution we did not take any, except that when a man said, "Is that made by the Beech-Nut Packing Company," we said, "No, it is made by P. Lorillard." We did not wish him to deceive himself. It was our intention to do just the opposite with all things.
40

BENJAMIN LLOYD BELT—CROSS.

Q. Then it did come to your knowledge that certain merchants were making that mistake?

A. There had been some remarks on the subject of the name.

Q. Mr. Belt, when the Beech-Nut cigarette was first put upon the market, did the package bear the expression "Cigarettes of Beech-Nut Quality"? 10

A. No. I think we had a phraseology to my recollection like that, that we changed slightly. Changed the wording, resulting from, I think, some kind of a protest or objection on the part of your clients. And not desiring to offend we acceded, I think, we making that change in the wording. I am not familiar with the exact words.

Q. My question, Mr. Belt, was more directed to know whether that change was made before or after—

A. I say, I think the label was in existence, but had not been shipped. That was my expression, that it was changed. 20

Q. You cannot be sure about it yourself?

A. I cannot at the moment. I am positive, though, almost positive, that the package as we have it, is the way we shipped it. That is my recollection.

Q. That is one of the new packages you have?

A. I imagine so. The only one I know of that was shipped, we were discussing several other things.

Q. Mr. Belt, about how many brands of all kinds of tobacco products, including chewing tobacco and smoking tobacco, cigars and cigarettes are now put out by the Lorillard Company? 30

A. There must be—

Q. Approximately?

A. 50-75-80, extreme aggregate, taking everything that exists.

Q. Can you state how many of these brands are put upon the market without the name "Lorillard" on them?

A. No, I cannot, Mr. Scott. 40

DEFENDANT'S PROOFS.

Q. You know that some are, though?

A. Some are without the name?

Q. Yes?

A. Yes.

10 Q. And if I were to name any particular one of the brands barring a few that you definitely remember, you could not tell me whether or not the name "Lorillard" appears on it, could you?

A. The detail of them from memory isn't in my mind. My association has been with cigarettes.

Q. Well, limit the question to cigarettes?

A. How?

Q. We will limit the question to cigarettes.

20 A. Why, yes, I think the name "Lorillard," I believe appears on most of the brands that we have put out since the disintegration. I think it is on Zira and Nebo.

Q. On the outside or inside of the box?

30 A. That I would have to challenge my memory for. The brands have been very slow sellers for several years. And I haven't kept up with them, but I think they are on. I know from several years ago, now, a year or two ago, at least, Mr. Maloney thought that we were making a mistake in not making "Lorillard" more prominent, more closely identifying it with new packages. And I think we put it on our Muriel cigar, the front of the box, Lorillard Muriel Cigar, or on the inside somewhere, I know that brand ran without it, and that has been more or less the case with a number. I know it is on our Lorillard cigars and our old Virginia cheroots, too, I imagine.

40 Q. Can you tell me definitely whether the Lorillard Company ever did issue any circular designed and worded to cause the salesmen to guard against any impression that the public or the retailer should think the Beech-Nut cigarettes were produced, or put out by the Beech-Nut Packing Company?

THOMAS J. MALONEY—DIRECT.

A. I don't recall any such publicity, Mr. Scott. I remember having spoken to the men, some small reference to it, but I don't recall. You see it has been several years ago, much has happened in my mind in that time. I don't recall such a circular. I don't recall any such—it might have been some direct letter to someone that may have written for information, I don't know.

10

Q. If there was any general custom on the part of district salesmen in this regard, it would not have originated with you then?

A. Well, no—yes, in so far as, for instance, if I was in Boston, and the district manager said, "Mr. Belt, somebody got into an argument, and asked me today about Beech-Nut and spoke about another Beech-Nut on the market." I may have said to him, "Well, I hope you made it very clear to him the fact in the case. I will be glad if you will do that whenever an occasion presents itself." But so far as in advance speaking to other men, and anticipating that, I cannot say that I ever did. I don't recall ever having done so. There was a very little of it and for a very short time.

20

Q. It would be your best opinion then that the only warnings of that kind would be merely casual and occasional?

A. They were, Mr. Scott.

Q. That is right?

30

A. Yes, sir. I don't recall such a letter, it may have been by the Legal Department or somebody else—it may be in existence, but I don't recall it at the moment.

THOMAS J. MALONEY, called and sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Cavanagh.

Q. Your name is Thomas J. Maloney; you are of legal age; you reside at 197 Belmont avenue, Jersey City, N. J.,

40

DEFENDANT'S PROOFS.

and you are president of P. Lorillard Company, the defendant in this case, is that correct?

A. That is right.

Q. Mr. Maloney, how long have you been president of the P. Lorillard Company?

A. Since 1900, going on 24 years.

10 Q. You were president of the P. Lorillard Company while it was a part of the old tobacco combine?

A. The American Tobacco Company never controlled the old—it controlled it but it did not own the stock. It had never been dissolved and stayed intact, and I succeeded P. Lorillard as the president in 1900.

Q. So you have been the president of P. Lorillard Company for—

A. Going on 24 years.

20 Q. And the P. Lorillard Company is engaged in the manufacture of all kinds of tobacco products except snuff?

A. All kinds except snuff.

Q. Mr. Maloney, how long have you been in the tobacco business yourself?

A. About 50 years.

30 Q. Will you briefly, and in order, if you can, as you go along, describe your connection and experience in the tobacco business from the time you started out up to the present, to give the Court an idea of your experience in this line?

40 A. I started as a boy in the tobacco business in Covington, Kentucky. I went to strip tobacco for a cousin of mine who was in the tobacco business. From that I went with a firm by the name of Lovell & Buffington, who were manufacturers of fine cuts and smoking tobaccos, and afterwards went in the plug business. I left Lovell & Buffington concern and went with the R. Hamilton concern, better known as the Bull Dog Tobacco Works. I was with him then as the superintendent of his factory, and had been promoted to a buyer. From the fall of 1880,

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until the time I made a connection with the Lorillard Company of Jersey City, and during that period I was four years buyer for the company of the raw materials. In 1885, July 1st, I made my connection with the Lorillard Company as the superintendent of their fine cuts and smoking. After a period of three years, I became general superintendent of the Lorillard Tobacco Company interests, who manufactured all kinds of chewing and smoking tobaccos and snuff. In, I think it was the spring of 1900—no, the Continental Tobacco Company was formed in the fall of 1899, the Lorillard Company was taken over by the Continental Tobacco Company and in the following spring I was made president, through the control of the common stock of the Lorillard Company, and I have maintained and held that position since. During that time I had been made a director of the American Tobacco Company that same year, and also occupied the position of vice-president of the American Tobacco Company up until the dissolution of the American Tobacco Company. So that brings you right up to the moment.

10

20

Q And from the time of the American Tobacco Company in 1911—

A. Yes.

Q. —up to the present day, you are and have been president of the P. Lorillard Company?

A. I am and have been president of the Lorillard Company.

30

Q. Mr. Maloney, it has been testified in this case that Luhrmann & Wilbern Company was a part of or controlled by the American Tobacco Company.

A. Yes.

Q. Did you ever have any official connection with the Luhrmann & Wilbern Company?

A. Why, I have no recollection other than the supervision and production of their manufactured goods.

Q. Through your connection with the—

40

DEFENDANT'S PROOFS.

A. With the American Tobacco Company.

Q. As I understand you, Mr. Maloney, you have had a great deal of experience, years of experience, in the manufacture of tobacco and in the buying of tobacco?

A. Yes.

Q. And in the selection of tobacco.

10 A. During my vice-presidency of the American Tobacco Company my chief position was that of charge of the manufacture, purchase and construction.

Q. And, as I understand it, you have gone from the leaf end of the tobacco business, with which you are familiar, to the manufacturing end?

A. Yes.

Q. Did you ever yourself devise any blends or formulas for tobaccos?

A. Many.

20 Q. In order that the Court may gather something of your experience, will you please name some of the better known or famous tobaccos of which you have made the blends?

A. I made the blend of Honest, I made the blend for the Pickerton Tobacco Company of Red Man, I made the blend of Beech-Nut, I made the blend of Havana Blossom, and many other blends during my time with the American Tobacco Company and the Lorillard Company.

30 Q. The blend or formula of tobacco is a very important factor in its success, from your experience, is it?

A. I would say yes.

Q. Mr. Maloney, did you ever yourself invent or devise any machinery in connection with the manufacture of tobaccos?

A. I have invented quite a few machines.

Q. Will you name one or two types or kinds?

40 A. I own the invention of the first man in America to put foil and paper together, that is one; I have invented labelling and stamping machines, and also driers. I was the first man to introduce into the tobacco busi-

ness what was the textile system of drying, which was used by yarns, which made an enormous saving in labor, and the breaking up of tobacco, as it was a continuous process, instead of like in the old days they put it on racks, carried it from room to room, and the tobacco stuck on those racks, they used to have to knock it off with pieces of belting on account of the sweetening material adhering to these racks, and there was great destruction and breakage of tobacco by this system. This was after I became associated with the American Tobacco Company. Some claimed it might destroy the trade, but through hard efforts I won out and had every plant connected with the American Tobacco Company throughout the United States equipped with that process of drying. 10

Q. How about stemming machines?

A. Stemming machines? I have had a great deal to do with it, but I have not been the inventor of stemming machines. I never invented a stemming machine. 20

Q. Mr. Maloney, in order that the Court may understand what we refer to as leaf tobacco and follow the case with more clearness, perhaps, will you produce some leaf tobacco?

A. I have some samples of leaf tobacco here which I would be pleased to explain to the Court. Like Mr. Belt, my eyes are getting poor, and I have got to use glasses. 30

Q. You may then explain to the Court what the various kinds of tobacco are in the leaf.

A. This is what we call our grade H tobacco, Burley tobacco, which is used in the Navy plug chewing.

Q. What is a Burley tobacco?

A. It is a particular kind of tobacco grown in the State of Kentucky, in the eastern and western part of Kentucky. 40

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There is a grade of leaf tobacco we call our P. grade (indicating), which we used in our second grade of plug chewing.

Q. Is that a Burley?

10 A. That is a Burley tobacco; that is the wrapper that goes to cover the plug (indicating). That is what we call bright Virginia or North Carolina tobacco.

Q. That is due to its color?

A. Due to its color and its process of raising.

This is what we call a Green River tobacco, it is raised in the southern section of Kentucky, used principally for long cuts and pipe smoking, and chewing tobacco, such as Five Brothers, Honest Long Cut, Liberty Long Cut, Mechanic's Delight Long Cut, and Green Turtle.

20 Here is what we call, Judge, Grade K (indicating). It is considered the highest grade of Burley tobacco that grows, used in Planet Plug Tobacco, which is sold in the New England States, the biggest seller that is in the New England country.

That is the wrapper, that is the dark Virginia, showing you how different the color may be between the two tobaccos grown in the same state, cured under different processes by heat (indicating).

30 The plug will show there. Have you the plug there, young man? (Package handed to witness.) There it is, right there. There is the Climax which shows the bright (indicating). That is the Planet plug, that is the wrapper that is used on the Planet Plug (indicating).

Now, we get down to the Burley type, what we call our G2X, which is made into the blend of the cigarettes of the Beech-Nut and the Camels, and of the Lucky Strikes and Chesterfield. That class of tobacco that goes into that blend to make that class of cigarettes is the Turkish tobacco and the Virginia tobacco, which I will show you later.

40 This is a class of Burley which we rate as our CL, which is made usually in the case of fine cut chewing to-

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bacco, such as Pioneer Fine Cut, our Sweet Burley Fine Cut, made by Liggett & Myers, or Spalding & Merrick, of Chicago.

There are types of Havana tobacco, which is used in connection with Between the Acts, Little Cigars, and our Muriel cigar, in the blend.

This is what we call the Connecticut, C2 (indicating). That grows in any size up into the wrapper, the binder, that is what we call a C2, used as a filler, and also used in connection with making Beech-Nut chewing tobacco. 10

Q. Beech-Nut chewing?

A. Yes, that is part of the blend. Here is Porto Rico filler. I have none of the Porto Rico leaf here, because of its duty being on the leaf, it is usually stripped in Porto Rico and they usually send it stripped because labor is cheap in that country. This is what they call the Havana filler (indicating). That is the term, I can't just think of the term they call it there in Cuba. There is a bunch of it, the Havana, showing you how close they work on the scrap there—they gather the small leaves and tie them in that condition (indicating). Here is WF, No. 1, that is Wisconsin tobacco. That is used in Beech-Nut chewing and the blend. 20

You see by these various tobaccos, (these are binders), that is where they get the scrap—those are the most perfect leaves that come out of the crop, and when the cigarmaker takes that, you will notice that the operator will take the face of the leaf and will stretch it. He takes his knife and strips it so as to get it the shape of the cigar when they roll the cigar, so that you will get a smooth surface, and these cuttings and trimmings the cigarmaker sells for scrap, and that is why you get the very best tobacco that grows into this blend. 30

Q. Beech-Nut blend, you mean?

A. Yes.

Q. Of the Lorillard tobacco? 40

DEFENDANT'S PROOFS.

Q. Yes, we have competitors, outside manufacturers. That is from Porto Rico, some Porto Rico tobacco (indicating).

Q. What is that, Mr. Maloney?

10 A. This (indicating) is the bright Carolina, this (indicating) is what we call the old Belt of Virginia tobaccos; this is the foundation of the blend of these blended cigarettes. The proportion is greater in most blended cigarettes of this class of tobacco than either the Turkish or Burley which go to make the blend of cigarettes.

I bring these specimens to the Court to show that it requires skill and time, a long time, to gather this information to enable a man to supervise and clearly operate a tobacco plant. As I say, I have been fifty years in the business, I have made a success of the business, I made
20 millions for the people who employed me as a young man, and it was my knowledge of this tobacco and the various types that raised me to the position which I have occupied for the last 25 years.

I was told at the time that the American Tobacco Company was formed—I was then the general superintendent of the Lorillard Company—some of my colleagues of the Lorillard concern said “we had better form a combination, any man who is not from North Carolina cannot live in that company,”—I said, “I never formed a combination,
30 a group of any kind in my life, and I will take my chance.”

Q. What is that tobacco, Mr. Maloney?

A. This tobacco here is broad leaf tobacco.

Q. What is that used for?

A. Used principally for binder and wrapper.

Q. And this (indicating)?

A. That is the same, only strip.

Q. Now, Mr. Maloney, outside of those tobaccos is also what is known as the Turkish leaf, isn't there?

A. Yes.

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Q. Where is that tobacco grown?

A. It is produced in Greece and Turkey, and we buy most of ours from Sassoon, and we have had headquarters at Constantinople, Athens and Sassoon.

Q. And that Turkish tobacco is used in the Turkish cigarettes?

A. For straight Turkish cigarettes, yes, 100 per cent. pure. 10

Q. When you make blended cigarettes, what do you use?

A. Usually with Burley tobacco and Virginia and Carolina tobacco.

Q. That is a domestic tobacco and the Turkish in the blend?

A. Yes. If it were not, which has been proven time and again, the tobacco interests of this country would have been hurt tremendously—if it hadn't been for the percentage of Turkish tobacco that holds fire well to consume and burn with the domestic tobaccos. 20

Q. As I understand your testimony up to this point, tobacco is a highly specialized industry, is it not?

A. I would consider it so.

Q. And the men who make a success in it are the men who have been brought up, born and brought up in it from the start?

A. I have been acquainted with most every man for the past 25 years that has been in the tobacco business who has made a success at all, and every one of them has come up from the ground. The men who are operating our plants today, some came in there as boys from Jersey City to me, from Louisville to me, from Middletown, and they have grown up into foremanships, assistant superintendentships, and superintendents, and to buyers. It takes years to bring them up. They must acquire the knowledge of these various grades. If they don't, how can they produce? 30 40

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Q. Then you would consider, from your long and wide experience in the tobacco industry, that any experience gained in the manufacture of food products, chewing gum, jellies, hams or candies and things of that sort in the food line would not be of any particular or practical benefit in your business?

10 A. I don't think so.

Q. In other words, speaking from your experience, you would not put the superintendent of a food plant in charge of your tobacco, to make your Murads or your Planet, would you?

A. No, indeed. Even with our board of ten directors, with five officials and the other five directors of the board are all practical men in their departments, we haven't got what they call a dead man in our organization, either by pull or any other way. He is there on his merits.

20 Q. How about the other tobacco companies with which you are acquainted?

A. So far as I know they are on the same basis. There may be some that aren't, but not the heads.

Q. They are all practical men that are heads of the companies that you are connected with?

A. Mr. Duler, president of Liggett & Myers, is a practical man, and Will Reynolds is one of the most practical.

Q. Of R. J. Reynolds Company?

A. Will Reynolds of the R. J. Reynolds Company.

30 Q. The Camel cigarette people?

A. Mr. Reynolds has risen in his position in the tobacco business in the sales end of it. I don't think there was a man more familiar with the raw material or the manufactured process of the tobacco.

Q. Now, Mr. Maloney, can you produce for us from your knowledge and connection as president of the Lorillard Company, some figures showing the extent of the tobacco business or industry, so that the Court will have some idea of what this tobacco business is, that is,
40 general statistics?

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A. Yes. The number of acres used in growing tobacco in the calendar year 1922 was 1,725,000 acres.

The number of pounds in the crop for that year was 1,324,840,000. The value of the crop was \$306,179,000.

The figures for the above three questions represent the aggregate of leaf grown in the United States in the year 1922, according to the official publication of the Department of Agriculture. 10

How many concerns engaged in the tobacco business—10,291. That counts men who get their license from the Government to enter the business.

Investment represented in these concerns \$604,839,000.

How many cigarettes manufactured, in the year 1922, there were 53,582,028,983; cigars, large, 6,892,608,654; cigars, small, 634,671,847; smoking and chewing tobacco, 382,070,511 pounds. The snuff was 38,162,198 pounds. The figures showing the actual manufacture have not yet been published but will be practically the same as above. 20

The number of people employed from these figures here shows 157,097. The value of the products, \$1,012,932,000. This is the last book issued by the Census Department of the Government.

Q. Mr. Maloney, can you give us some idea, and have you before the Court, simply for exhibition purposes, the principal brands that are put out by your concern, the Lorillard Company? 30

A. Yes.

Q. Will you name them, for instance the smoking and chewing tobaccos?

A. Yes. We have Climax as our leading plug brand. Planet comes next, in scrap tobacco, that is in the classification of scrap tobacco comes the Beech-Nut chewing and Honest is the second brand, with the brand of Bagpipe following close, if not probably leading Honest today at the rate it is going. In smoking tobaccos, our leading brand of smoking tobacco is Union Leader, and then comes 40

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Sensation, Omega, Mechanics' Delight and Long Cut, and Buzz and Red Cross.

Q. Just to be brief, this display which is before the Court here, running from this end of the railing—

A. Yes.

10 Q. —over to there (indicating), that is practically a good showing of the various tobacco products that the Lorillard Company puts out, is it not?

A. I would say yes.

Q. About what is the total approximate business of the Lorillard Company a year?

A. Between seventy and eighty million dollars.

Q. And how many people do you employ, all told, about?

20 A. I think at the present time about eight to nine thousand people. The introduction of machinery in the tobacco business since before the war has been tremendous. It has enabled the manufacturers of tobacco to almost cut their total labor in two. I will cite, for example—I will take that Polar Bear pack; I go back to before the machinery was introduced, a task, what was considered at that time before machinery came, a girl would pack 800 of those packs a day, that would be say, 100 pounds. She got probably a dollar and a quarter for doing that. We now put two girls on a machine and we get 100 gross from that machine, and there is 144 papers to the gross,
30 so you can see what machinery has done, and with it all we have never had labor enough yet to go around, no matter how much machinery seems to be introduced into the business, we never cease, I mean we keep running constantly.

Q. How many factories have we, Mr. Maloney, about?

A. About twenty.

Q. They are located in various parts of the country?

A. In various parts, starting with New York City, Jersey City, Newark—

40 Q. What Newark and Jersey City factories have you?

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A. A cigar factory which we own right here in Newark.

Q. What in Jersey City?

A. Two plants, a cigar factory on First street, and what we call the Marion branch on the west side of the hill.

Q. Can you make this Beech-Nut tobacco at the Marion branch? 10

A. Yes, making the Beech-Nut tobacco in three factories.

Q. Where?

A. Jersey City, Middletown and Louisville.

Q. Middletown, Ohio?

A. Middletown, Ohio.

Q. Mr. Maloney, has the Lorillard Company, to your knowledge, in the twenty odd years you have been president of it, ever manufactured or sold or had any connection with any concern manufacturing food products? 20

A. None.

Q. And in your wide experience in the tobacco industry did you ever know of any tobacco manufacturing concern which has also engaged in the food business?

A. No.

Q. What is the retail price of this chewing tobacco, Lorillard scrap chewing tobacco?

A. You mean the Beech-Nut tobacco?

Q. Yes, that package there (indicating). 30

A. Ten cents.

Q. How many ounces are in there?

A. Two ounces.

Q. How many ounces in the usual scrap tobacco package?

A. From two and one-quarter to two and one-half ounces. Two and one-half is the maximum weight that I know of today in that class of tobacco.

Q. I understood your testimony to be that nothing but the highest grade tobacco is put into that cigarette, that 40

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you explained to the Court, and in the chewing tobacco, as you explained to the Court?

A. Tobaccos are classified, you see, in the cigar, as in the bright Virginia Belt and the dark Virginia as to wrappers, binders, fillers and what they call trashes.

10 Q. There is nothing but high class tobacco in them?
A. Nothing but high class. We standardize as the best class of that tobacco in this country.

Q. What have you to say as to the plaintiff's charge that that Beech-Nut chewing tobacco of yours is a cheap tobacco?

A. I just think he doesn't know what he is talking about, he doesn't know tobacco, that is all.

Q. That tobacco has a good rating in the tobacco world?

A. I would like to ask the plaintiff a question, if they ever chewed Beech-Nut tobacco.

20 Q. That tobacco has a good rating in the tobacco world?

A. It is recognized in the trade as the standard.

Q. To your knowledge how does the volume of sale of this Beech-Nut tobacco compare with other chewing or smoking tobaccos on the market, the volume of sales or amounts sold a year?

30 A. I would say that the brand of Beech-Nut, according to the figures of 1922, was as large as nearly all other brands of this class sold. I think there was something about over sixty million pounds of scrap tobacco used, and I think there was over thirty millions of Beech-Nut.

Q. Mr. Maloney, speaking about this tobacco again and it being called scrap, I notice you have the word "chewing" on there. That is not a true scrap tobacco, is it?

A. No, that is made from long leaf. I say we do use some cuttings.

Q. You showed the Court the cigar cuttings?

A. Yes.

40 Q. It is not sweepings that you take out of the factory or anything of that sort?

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A. No. We own today probably the largest stock of raw material ever owned in the world by one company. We own today over one hundred million pounds of seed leaf tobacco today.

Q. Did you or your company ever have any of the intention or desire or idea this tobacco should sell upon the reputation of the Beech-Nut food products?

10

A. No, never.

Q. What, if any, instructions have you as president of your company given as to the preservation of formulas of tobacco wrappings and the like?

A. What is that?

Q. Have you ever given any instructions, or is your practice to preserve tobacco formulas, wrappings, wrapping materials?

A. Absolutely, yes.

Q. You always keep them?

20

A. Absolutely, there can be no destruction without the approval of the president of the company.

Q. You are willing to fill an order any time you receive an order for tobacco—

A. Any time.

Q. —from a reputable person.

A. Yes.

Q. Can you state, as president of your company and connected with the Luhrmann & Wilbern Company, whether you ever had any intention of abandoning that brand of Beech-Nut Scrap Tobacco?

30

A. Never. Brands are too scarce articles associated with the tobacco business to cast aside as of no value. That trademark today stands as worth millions.

Q. Mr. Maloney, there is one other thing I should like you to tell the Court, and then I will be through. In connection with the representation of the Twin Beech-Nuts which appear upon your chewing package, and also upon the cigarette package, can you tell the Court just exactly how that design of that Beech-Nut, the picture of the

40

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Beech-Nut came to be adopted, so far as your own knowledge goes?

A. Yes, I think I can shed some light upon that.

Q. I wish you would tell the Court.

10 A. It was either Mr. Ball or some of his associates in the sales department came in with a sketch. I said, "Who in the name of heavens ever brought that thing in as a beech nut," and whoever it was said, well, they stood by it, that that was the exact—I said, "I know better because I have a beech nut tree on my place."

Q. Where is your place?

20 A. Saddle River, New Jersey, here, and I said, "I will bring down some beech nuts, and I happened to have my secretary call because I had a number of foreign language newspaper men, who came to see me, and it happened to be on Sunday, call up on the telephone, wanted to see me, and I had my secretary at my home, and after I got rid of those men I said, "Come, Leo, go with me and we will get those beech nuts," and I wanted to run up to the farm a minute anyway, so we got in the car and brought down those beech nuts with us, and that is what the thing was about.

Q. You took down those two beech nuts?

A. I must have had a dozen of them. I brought some in an envelope.

30 Q. Will you show the Court some beech nuts from your farm of the kind you gathered?

A. (Witness hands beech nut to the Court.)

Q. Yes, they look just exactly like the picture that is on that.

Mr. Cavanagh: Those are all the questions I will ask you, Mr. Maloney.

Mr. Scott: There will be no cross examination, your Honor.

WILLIAM R. PERKINS—DIRECT.

WILLIAM R. PERKINS, recalled:

Direct examination by Mr. Gifford.

Q. You have already testified in this case?

A. Yes.

Q. In Exhibit D. 18, there is a correspondence commencing on June 28th, 1918, and extending down to October 15, 1919; were you familiar with the circumstances surrounding that correspondence?

A. Yes, sir.

Q. In what way did you become familiar with those circumstances?

A. As counsel for the Lorillard Company.

Q. Did you participate in any way to the matters related in that correspondence?

A. I participated in the conferences concerning them, and I drafted most of the letters, that is, so far as written by the Lorillard Company.

Q. Will you please state the circumstances surrounding that correspondence, taking up the letters in their order?

Mr. Scott: I object to that question, if the witness is to be asked he ought to let us know what circumstances these are.

(Question repeated.)

The Court: I don't think that is admissible.

Q. Will you please make any explanation that is within your knowledge and which you think important to the Court of the statements in this correspondence?

Mr. Scott: I object to that, your Honor.

The Court: Objection sustained.

Q. In the letter of June 28th, 1918, is the following paragraph, "On your part, there the matter was dropped, you having made no further reply or objection. On our part, we have continued to manufacture and sell tobacco

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products under the trademark 'Beech-Nut' until today it is one of the leading tobacco trademarks in this country."

Q. Can you point out here a specimen of the package which was there referred to?

A. It is the Beech-Nut package with the red radiating lines which was put up by the Lorillard Company in 1915,
10 Defendant's Cross Exhibit 1.

Mr. Scott: The question is asked the witness to say what package this letter referred to?

Mr. Gifford: Yes.

Mr. Scott: And he points to this package?

Mr. Gifford: Yes.

Mr. Scott: I object to the answer and move it be stricken out.

The Court: I will permit that, he was referring
20 to the chewing tobacco that is in issue in this suit. I understand. I should think you would admit that.

Q. In the course of this correspondence, the Beech-Nut Stogie Company is referred to, and the plaintiff called the attention of the defendant to the use by that company of the name "Beech-Nut," and in the letter of July 22, 1919, reference was made to calling the attention of the Lorillard Company to the matter and "let them take steps against the Beech-Nut Stogie Company." Were
30 any such steps taken?

A. Why, there was, at that time, the information to the effect that the Stogie Company was applying for registration in Washington, of the brand Beech-Nut for cigars. They had been under stogie, but that is a form for cigars. And we investigated that and found out that was untrue. This Stogie Company had been doing business for some years over here in Pennsylvania, dating back to a time when there is a question whether the manufacturer of a chewing tobacco could stop another person from using
40 the trademark for cigars. The Patent Office had not at

that time held that the two were so near together that one embraced the other, and afterwards they understood that decision and held otherwise and that is probably that situation.

Mr. Scott: I move to strike all this out after the answer to the question. The question was were any steps taken? There was a motion or so that answered it, and I move that the rest be stricken out.

The Court: Yes, I don't think this long explanation is necessary.

Q. In the letter of the Lottinck Company to the plaintiff, July 26, 1933, there is this paragraph: "We are now opposing in Washington an attempted registration by the concern of the name 'Beach-Nat' for some tobacco products. This is the beginning of movement which we hope will result in stopping the use of the name by this concern for tobacco products." What was done in that connection?

A. That is what I say was the information we had. And we took it up and found that that information was erroneous. We were informed they were going to do that, and took it up with our lawyers, but found out that they were not going to do it.

Q. In the letter of August 2, 1933, from the plaintiff to the defendant is this statement: "Our president, Mr. Asbell, was here yesterday, and your letter of July 26th, was presented after the meeting of our Executive Committee. In discussing the situation a suggestion was made which probably has not occurred to you and therefore we submit it to you for your consideration; in view of the splendid success of your Beach-Nat wrap tobacco, would it not be worth while to stimulate your Beach-Nat wrap tobacco package in a wrapper for your signature, etc." What do you understand to have been the Beach-Nat wrap tobacco package they referred to?

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A. The same package I referred to before.

10 Q. That is, Defendant's Cross Exhibit No. 1. In the letter of August 27, 1919, to the plaintiff from the defendant is this statement: "Your letter of the 7th has been received and its contents noted, and we appreciate very much your suggestion of our use for the cigarette tobacco of the design now upon our scrap package. This thought occurred to us when we were originating a pack- age of the cigarette and was tried out with the result that in our opinion the design was not adaptable to a package of the size of a cigarette package." What did that refer to?

A. The scrap package referred to the same scrap package I just referred to.

Q. And what was the package for cigarettes which is referred to there?

20 A. Well, the cigarettes had not at that time been put out. The package, the design was afterwards put out, but hadn't been put out at that time.

Q. This letter speaks of a design which was not adaptable to a package the size of a cigarette package. Is there any exhibit here of that design for a cigarette package?

A. Mr. Belt introduced that with his testimony. I have forgotten the exhibit number. It is marked D. 45.

30 Q. That is all.

No cross examination.

Mr. Cavanagh: Mr. Scott, we have a great number of exhibits or specimens, and you also have a set over here of your goods. It would be too much of a burden, I think, to try to put these in as exhibits. Would you be willing to stipulate that any time hereafter that we want to use them each party, upon an appeal, could use the same?

DISCUSSION RE EXHIBITS.

Mr. Scott: I don't know that it can be part of the record, because we are not going to put them in court.

The Court: You are not going to put them where?

Mr. Scott: If he is not going to put them in as exhibits, I don't see what effect the stipulation is going to have on them, but I can assure Mr. Cavanagh, if he simply wants to list these things, we will list ours and we will take them into the Court of Appeals informally, but I don't see how there can be anything binding about it, if they are not put in in the form of exhibits.

The Court: What are they here for now?

Mr. Scott: For the Court to look at; the exhibits that we introduced were simply to show the place where those labels were used, and the variety of products; I will have to leave it to Mr. Cavanagh for an explanation of his selection.

Mr. Milton: Can't we offer these exhibits as one, and furnish a list to the stenographer, what they consist of?

The Court: I should think so. Maybe the Court of Appeals would like to look at those things.

Mr. Cavanagh: Then, if your Honor please, defendant now offers in evidence, as one exhibit, the Lorillard collection of products which is here before the Court, and we will prepare a list of these various products and furnish a copy for the Court and for the plaintiff, if that is permitted by the Court.

(Received and marked Exhibit D. 48.)

The Court: Perhaps the other side will want a number for their products?

DISCUSSION RE EXHIBITS.

Mr. Scott: Plaintiff offers the collection of plaintiff's products present in the court room, and will furnish the reporter with a list thereof, it being understood that each party may withdraw these from the Court's custody—was that the understanding, or do you want to leave them here?

10 Mr. Milton: Well, I think we should leave them here.

Mr. Scott. All right. Just leave the offer unqualified.

20 Mr. Cavanagh: I think we might leave them here, and I would also suggest this, Mr. Scott, with the permission of the Court, that in case of the wear or tear of any of the packages we have on the list or in case any become lost or soiled, that we can replace them with duplicate packages, the same as we did with the stipulation throughout this long case. Packages rapidly become lost or soiled and we would like to substitute any in case one was not according to the list.

(Plaintiff's collection is marked P. 45.)

Mr. Cavanagh: If your Honor please, I would also like to offer as one exhibit, the collection of Mogul, Omar and Camel products as one exhibit.

(Received and marked Exhibit D. 49.)

30 Mr. Cavanagh: Now, your Honor, there is only one more point that I would like to ask Mr. Scott and counsel for the plaintiff about and that is this, that we have here the original Patent Office exhibits. Now, the stipulation in the Patent Office case in connection with this record is to the effect, and I think counsel will agree with me, and correct me if I am wrong, that all the testimony in the Patent Office case, plus the exhibits and the stipulations, are incorporated in this case, the same as if taken herein. Is that correct, Mr. Johnson?

40

DISCUSSION RE EXHIBITS.

Mr. Johnson: That is right.

Mr. Cavanagh: And as far as Patent Office exhibits go, I see no necessity, in view of that stipulation of reintroducing them as separate exhibits here. Is that correct?

Mr. Johnson: That is right.

The Court: If they are identified, there is no need of doing it the second time. 10

Mr. Cavanagh: They are identified. We have a list of them in the Patent Office case.

Mr. Scott: It must be understood that the Patent Office testimony is not reprinted in our large volumes, but there is a separate volume, two volumes, one of the Lorillard Company and one of the Beech-Nut.

Mr. Cavanagh: Defendant would also offer in evidence as Exhibit D. 50, a number of pieces of window display advertising, putting them in as one group exhibit, there being three pieces all told. 20

(Received and marked Exhibit D. 50.)

DEFENDANT RESTS.

Mr. Scott: We have no rebuttal.

(At this point an adjournment was taken to a date to be fixed by the Court for oral argument. In the meantime briefs are to be exchanged on or about December 1st, and if answering briefs are to be filed, they are to be filed by the respective parties upon the date of the oral argument.) 30